87-1299

No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

COLONY SQUARE COMPANY,
a Georgia Limited Partnership,
Petitioner,

vs.

THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a judge's impartiality might reasonably be questioned, thereby requiring his recusal under 28 U.S.C. § 455, when the judge has secret *ex parte* communications with one party, the judge has his opinions secretly written by that party, and the judge collaborates with that party in false denials of his improper conduct.

2. Whether a litigant is deprived of due process of law when, following oral argument, the judge immediately has secret *ex parte* communications with the litigant's adversary, the judge has his opinions secretly written by the adversary, and the judge collaborates in false denials of his improper conduct.

3. Whether, as in *Liljeberg v. Health Services Acquisition Corp.*,[1] the judge's opinions should be vacated, especially where (unlike *Liljeberg*) both the judge and the prevailing party have known all along of the circumstances requiring the judge's recusal.

4. Whether the Counsel's Liability Statute[2] and the integrity of the federal judicial system require that a lawyer who engages in *ex parte* contacts, who secretly writes judicial opinions, and who falsely denies that conduct in court and in an affidavit filed in two federal courts, should be assessed attorneys' fees and be disqualified from further participation in the case.

(The United States Court of Appeals for the Eleventh Circuit answered no to all four of these questions.)

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1. Supreme Court Docket No. 86-957. The Court heard argument in *Liljeberg* on December 9, 1987.

2. 28 U.S.C. § 1927.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, Colony Square Company ("Colony Square"), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit rendered in this case on June 12, 1987.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit dated June 12, 1987, is reported at 819 F.2d 272 and is reproduced in Appendix A to this petition beginning at page A1. The opinion of the United States District Court for the Northern District of Georgia is reported at 60 Bankr. 1003 (1986) and is reproduced in the Pet. App. B beginning at page A12.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1987. A Petition for Rehearing before the panel and Suggestion for Rehearing *en banc* were denied on November 6, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and statutory provisions involved in this case, the fifth amendment to the United States Constitution and 28 U.S.C. §§ 455 and 1927, are set forth in Pet. App. H beginning at page A89.

STATEMENT OF THE CASE*

This petition involves the appropriate response of federal courts to repeated, serious professional misconduct by lawyers and judges.

The case is similar in significant respects to *Liljeberg v. Health Services Acquisition Corp.*, S. Ct. Doc. No. 86-957 (argued December 9, 1987). However, this case raises important variations on the issues in *Liljeberg*, and also provides the opportunity for consideration of issues going beyond the more limited focus of *Liljeberg*.

The case arises out of a bankruptcy in the Northern District of Georgia.[1] The debtor is Colony Square Company. The principal creditor is the Prudential Insurance Company of America. The asset in dispute is the Colony Square Complex, a real estate development in Atlanta valued at more than $200,000,000.

1. The Ghostwritten Opinions

At least three times in this case, Bankruptcy Judge Hugh Robinson filed opinions that had been secretly written for him by Prudential's lawyers.[2]

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*References to the pleadings and other court papers delivered by the District Court to the Court of Appeals as the official Record will be by Record Volume (R1, etc.), Document Number (1-21) and by page number(s).

Record references to transcripts will be by the District Court's assigned volume number (i.e., R3 through R6) and the page number.

Exhibits denominated "Pl" or "CS" are Petitioner's exhibits; exhibits captioned "Def" or "PR" are exhibits tendered by the Respondent. References to material in the Appendices to this Petition will be cited by Appendix letter and page as Pet. App. .....

1. The basis of federal jurisdiction of the original action is the Bankruptcy Act of 1898 (Repealed), former 11 U.S.C. §§ 1 et seq.

2. The three ghostwritten opinions were not the only *ex parte* contracts between Judge Robinson and Prudential's lawyers. *See, e.g.*, R3-74, 76; R4-205, 246-251.

Two of those opinions were crucial. The first transferred to Prudential title to the Colony Square Complex.[3] Judge Robinson secretly requested Prudential to write that opinion for him within two hours after oral argument on the issue. The second ghostwritten opinion was also of critical importance not only to the parties but also to the administration of justice. It denied a motion by Colony Square to disqualify Judge Robinson for lack of impartiality.[4] The third opinion related to a challenged affidavit by a Prudential lawyer regarding his firm's fees. The opinion upholding the disputed affidavit was secretly written by the same Prudential lawyer who had submitted it.[5]

Shortly after the hearing on the title transfer, Judge Robinson placed a telephone call to Francis M. Bird, Jr., lead counsel for Prudential.[6] The judge told Mr. Bird that he intended to rule in favor of Prudential, and asked Mr. Bird to prepare an opinion for him.[7]

Mr. Bird understood from Judge Robinson that the judge's *ex parte* telephone call, the inside information about the result of the hearing, and Prudential's preparation of the judge's opinion should all be kept secret from Colony Square.[8] Accordingly, both Judge Robinson and Prudential's counsel concealed the truth from Colony Square, and "[i]t was not until months later that Colony's

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3. CS-3.

4. Pet. App. F-A64. That disqualification motion was filed in 1984 and is not the subject of this petition.

5. CS-14.

6. R3-53, 56-57; R4-173. The date was June 22, 1984.

7. R3-56-59, 72, 75, 89, 92; R4-173, 182, 183, 200.

8. R5-287-290.

lawyers first learned that Judge Robinson had not drafted these orders."[9]

All of Prudential's lawyers, both outside and in-house, were implicated from the outset in the *ex parte* contacts with Judge Robinson. Mr. Bird, "excited at having a judge advise us that he had decided in our favor," immediately informed other members of his own firm as well as William A. Bonn and John Westney, who were Prudential's in-house counsel.[10] Mr. Bonn, in turn, promptly called the chief real estate investment counsel at Prudential's office in New Jersey to relay the judge's *ex parte* disclosure that Prudential "had won."[11]

The three ghostwritten opinions totaled 36 pages. Except for two or three typographical errors in the first opinion, Judge Robinson signed all of them exactly as they had been written by Prudential.[12] He made no editorial, factual, or legal changes whatsoever.[13]

The Court of Appeals noted that Judge Robinson "discussed specific points" to be included in the opinions when he made the *ex parte* telephone calls to Prudential's lawyers.[14] These points were written in short and sketchy notes of less than a page by Mr. Bird.[15] The record also shows, without contradiction, that the Prudential-authored opinions included matters that went well beyond the points suggested by the judge. *Compare, e.g., infra,* Pet. App.

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9. Pet. App. A-A3. (Opinion of the Court of Appeals.)
10. R3-61, 55-56, 60-61; R4-173; R5-3.
11. R4-175-177, 193.
12. R4-246-251; R3-129-130; R4-215; R5-220-221, 224.
13. *Id.*
14. Pet. App. A-A9.
15. *See, e.g.,* Pet. App. E-A64.

E-A64 (notes taken with respect to opinion denying disqualification) *with* Pet. App. F-A65-A81 (disqualification opinion). Indeed, the District Court specifically found that in ghostwriting one opinion, Prudential used "other sources"[16] besides the judge's brief comments. In another opinion, the Prudential author incorporated his own subjective knowledge of the issues, as an advocate for one side, into the ghostwritten opinion.[17]

2. The False And Misleading Statements By Prudential's Counsel And Judge Robinson

In addition to keeping Colony Square ignorant of their *ex parte* contacts, Prudential and Judge Robinson actively covered up their illicit conduct. At a related hearing in the Pittsburgh Bankruptcy Court, Mr. Bird averred to the Court:

> "We don't know how Judge Robinson is going to rule. We think we have a good case for getting Prudential's deed. But that's in the breast of the Court."[18]

Three days before making that statement to the Court, however, Mr. Bird had written Judge Robinson's opinion

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16. Pet. App. B-A23. The lawyer who authored the opinion was not the same lawyer who had spoken to Judge Robinson and taken the notes. Although the notes were less than one page (Pet. App. E-A64), the opinion was twenty-two pages and was put through six drafts. Pet. App. F-A65-A81; R3-130, R4-207-211.

17. R2-18-13.

18. Pl-3, at p. 9. Mr. Bird's statement was material to the hearing in Pittsburgh. In that hearing Colony Square sought to enjoin Prudential from obtaining title to the Colony Square Complex. R3-82-83. Mr. Bird's statement was in response to Colony Square's argument stressing the urgency of the injunction request because Judge Robinson could rule at any time, his ruling could be adverse to Colony Square, and the Pittsburgh motion for an injunction would then become moot. Pl-3. Transcript of June 25, 1984, hearing in Pittsburgh Bankruptcy Court, p. 9.

giving Prudential the deed at issue, and he had passed word to Prudential, without qualification, that they had won.

The District Court was later to find that Mr. Bird's statement to the Court was "unquestionably misleading" and "raises questions regarding Mr. Bird's credibility."[19]

Subsequent to the title transfer opinion, but still unaware that it had been ghostwritten, Colony Square filed its first motion to disqualify Judge Robinson.[20] In opposing that motion, Mr. Bird swore in affidavits submitted both to the District Court and the Bankruptcy Court that he had had "no *ex parte* contact with Judge Robinson."[21] Mr. Bird also categorically denied "any improper contacts or appearance thereof."[22] He elaborated that he had not even had "social or personal" contacts with the judge "on any occasion" except for "the possibility of an occasional casual encounter in the courthouse, on the street, or at the Southeastern Bankruptcy Law Institute."[23]

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19. Pet. App. B-A54.

20. Pet. App. F-A64. That disqualification motion was filed in 1984 and is not the subject of this petition.

21. Pl-4 at p. 6; R3-102-103.

22. Pl-4 at p. 6.

23. *Id.* The District Court found that it could not "seriously be contended that the submission of a proposed order ruling on a pending motion is anything other than a written communication as to the merits of a cause." Pet. App. B-A52. At the same time, the District Court generously declined to "impute to Mr. Bird a wilful desire to conceal his 1984 *discussions* with Judge Robinson from this court." Pet. App. B-A54. (emphasis added). The court based that conclusion on what it called the "ambiguity" of whether the secret communications between Judge Robinson and Mr. Bird constituted *ex parte* contacts. *Id.* The Circuit Court did not address the issue, nor did it make any reference to Mr. Bird's false statement to he Pittsburgh Bankruptcy Court or to his false affidavit.

Mr. Bird's false affidavit was compounded by the complicity of Judge Robinson. Judge Robinson did not expose the false denial of his *ex parte* contacts with Mr. Bird. On the contrary, he endorsed it. In his opinion denying the motion to disqualify him, Judge Robinson reaffirmed that "any alleged bias [in favor of Prudential] would have been the result of contacts in a purely judicial environment which . . . cannot serve as the basis for disqualification."[24] This falsely exculpatory language was in fact written by Prudential; indeed, it was one of those matters that had not been mentioned by Judge Robinson in his *ex parte* telephone call requesting the opinion. See Pet. App. E-A53. Prudential insists that Judge Robinson reviewed the ghostwritten opinions before signing them,[25] and the District Court so found.[26] Judge Robinson, therefore, knowingly endorsed the falsehood.

The District Court was misled by these false denials of extrajudicial contacts. Relying directly upon Mr. Bird's affidavit in affirming the denial of Colony Square's 1984 motion to disqualify Judge Robinson, the District Court stated that "Mr. Bird also denies any implication of *ex parte* contacts in reference to the case. . . ."[27]

It is a matter of record, therefore, that Prudential and Judge Robinson engaged in a series of *ex parte* communications including the ghostwriting of three judicial opinions, and that they actively covered up their illicit contacts with false and misleading statements in court, in an affidavit, and in a judicial opinion.

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24. Pet. App. F-A73.

25. Prudential Brief before the 11th Circuit, p. 16, n.16.

26. Pet. App. B-A45.

27. PR-42 at 6.

3. The Failure To Take Any Remedial Measures

Upon discovering what had occurred, Colony Square promptly sought several remedial measures under the Federal Recusal Statute (28 U.S.C. § 455), the Due Process Clause, the Counsel's Liability for Excessive Costs Statute (28 U.S.C. § 1927), and the courts' supervisory powers over lawyers and inferior court judges.

Appropriate remedial measures include: (1) retroactive disqualification of Judge Robinson; (2) expungement of his orders and opinions in the case; (3) reconsideration *de novo* by an impartial bankruptcy judge of the issues in the expunged orders; (4) disqualification of Mr. Bird and his firm from further participation in the case; and (5) assessment of attorneys' fees and costs against Prudential and Alston & Bird for the proceedings that have been rendered void by their unethical conduct and for the litigation that has been required to uncover and to challenge it.

The District Court refused to order any remedial measures whatsoever, and the Eleventh Circuit affirmed. The Eleventh Circuit held that the recusal statute was inapplicable to Judge Robinson's conduct[28] and that there had been no violation of due process.[29] Although the Eleventh Circuit noted that disqualification and fees had been requested against Alston & Bird,[30] the court did not discuss the matter further.

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28. Pet. App. A-A8, n.14.

29. Pet. App. A-A8 - A-A11.

30. Pet. App. A-A2, n.1.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE, WITH LILJEBERG, PROVIDES AN IDEAL OPPORTUNITY FOR THE COURT TO SET OUT CLEAR GUIDELINES FOR THE FEDERAL COURTS TO FOLLOW IN APPLYING 28 U.S.C. § 455.

Essential to the integrity of the judicial process is that misconduct by judges and lawyers be dealt with by more than words of disapproval. As the Eleventh Circuit acknowledged, "[t]he cases admonishing trial courts for the verbatim adoption of proposed orders drafted by litigants are legion."[31] Nevertheless, that same judicial misconduct occurred yet again in this case, and "bankruptcy judge [Hugh Robinson] here compounded this error by failing to give Colony an opportunity to respond to Prudential's proposed orders."[32] Moreover, in this case Judge Robinson's misconduct was aggravated by *ex parte* contact and the secret preparation of judicial opinions by a litigant.

Despite the flagrant nature of Judge Robinson's misconduct, the Circuit Court allowed the judicial opinions that had been secretly written by Prudential to stand as if they had been the opinions of the court.

The Supreme Court should take this opportunity to make it clear that unethical conduct by judges and lawyers, which corrupts the judicial process, will not be condoned as "harmless" error.

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31. Pet. App. A-A5.

32. Pet. App. A-A5.

A. When A Judge Has Actual Knowledge That There Are Compelling Grounds To Question His Impartiality, But Nevertheless Fails To Recuse Himself, The Only Effective Remedy Is To Vacate The Judge's Orders In The Case.

Like *Liljeberg v. Health Services Acquisition Corp.*,[33] this case involves the "retroactive" vacation of judicial orders. Unlike *Liljeberg*, however, both the judge and the prevailing party in this case had actual knowledge of the reasons that required the judge to recuse himself at the time the orders were entered.

In *Liljeberg* the Fifth Circuit disqualified the judge and vacated his orders retroactively despite his lack of actual knowledge of the ground for his disqualification at the time he ruled, and despite the admittedly harsh effect on a litigant who had "fairly won a judgment."[34] In the present case, by contrast, Judge Robinson was well aware of his own illicit conduct, and Prudential eagerly took full advantage of the unfair opportunity that was secretly presented to it.

The statutory command is clear. "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). Accordingly, "[w]hen a judge learns that grounds for his disqualification exist . . ., he should disqualify himself regardless of the source of his information. No action by a party is required to invoke the provision of [§ 455]."[35]

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33. Supreme Court Docket No. 86-957 (argued Dec. 9, 1987).

34. *Health Services Acquisition Corp. v. Liljeberg*, 796 F.2d 796, 802 (5th Cir. 1986), *cert. granted*, 107 S. Ct. 1368 (1987).

35. 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, § 3550 (2d ed. 1984).

The statute "is directed to judges, not to litigants, and it is meant to be self-enforcing."[36]

By the simple expedient of ignoring his clear obligations under the Recusal Statute, however, Judge Robinson presented the appellate court with what the court chose to treat as a *fait accompli*. Thus, Judge Robinson successfully violated the congressional command of § 455, denied Colony Square its right to an impartial judge, and prevented the only effective remedial measure.

If the Supreme Court should affirm the retroactive remedy in *Liljeberg*, then the Eleventh Circuit's failure to vacate Judge Robinson's orders in this case is *a fortiori* reversible error. On the other hand, if the Court should find the retroactive remedy to be improper on the facts of *Liljeberg*, this case provides an illustration of the appropriate use of retroactivity since both the judge and the prevailing party were well aware all along of compelling facts mandating the judge's disqualification under § 455(a).[37]

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36. *Delesdernier v. Porterie*, 666 F.2d 116, 121 (5th Cir. 1982).

37. A related issue as to which there is, potentially, a controlling distinction between this case and *Liljeberg* is the applicability of Rule 60(b), Fed. R. Civ. P. The motion in *Liljeberg* was made a year and a half after the judgment at issue. *Liljeberg v. Health Services Acquisition Corp.*, No. 86-957, Transcript of Oral Argument, p. 24. The motion in this case, by contrast, was made within less than a year after the earliest challenged order. Also, it was made immediately after Colony Square succeeded in discovering the truth about the ghostwritten orders. Pet. App. A-A3. In addition, the motion in this case is based in substantial part upon knowing misconduct by a judge, which falls under Rule 60(b)(6). Moreover, as is shown *infra* at pp. 25-26, the judgment in this case is void, and falls under Rule 60(b)(4). Therefore, although the Court might hold that Rule 60(b) precludes vacation of the judgment in *Liljeberg*, that rule would not affect a retroactive remedy in this case.

B. This Case Requires A Determination Of Whether A Judge's "Impartiality Might Reasonably Be Questioned," On Facts That Are Different From And More Flagrant Than Those In Liljeberg.

In *Liljeberg* the issue is whether the judge's impartiality might reasonably be questioned under § 455 because he had known but then forgotten about a conflict of interest. The present case requires construction of the same statutory language, but in a factual context where the judge knew full well that he was engaging in *ex parte* communications and soliciting ghostwritten opinions, and where he shortly thereafter collaborated in false denials to conceal his illicit conduct.

The Eleventh Circuit opinion sharply raises that issue because it held that § 455(a) is inapplicable to Judge Robinson's conduct. The Court explained:

> Our review of the case law reveals no case applying § 455(a) to this type of circumstance; this provision has been uniformly applied to instances where judges have had financial or personal conflicts of interests.[38]

In fact, the case law and other authorities are to the contrary. The evil of *ex parte* contacts alone is recognized as being "particularly acute," because of their "calculated secretiveness" and because such conduct "suggest[s] a receptive and thus *prejudicially receptive state of mind in the judge.*"[39] Accordingly, codes of judges' and lawyers' ethics categorize the prohibition of *ex parte* contacts as an essential aspect of judicial impartiality. For example, Canon 3 of the ABA *Code of Judicial Conduct* (under

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38. Pet. App. A-A8, n.14.

39. C.W. Wolfram, *Modern Legal Ethics* 604 (1986) (emphasis added).

which *ex parte* contacts are expressly forbidden) is headed "A Judge Should Perform the Duties of His Office Impartially. . ." Also, involvement of a judge in *ex parte* communications is described in the Reporter's Notes to the ABA *Code of Judicial Conduct* as a circumstance in which the judge's "impartiality might reasonably be questioned."[40] Similarly, Rule 3.5(b) of the ABA *Model Rules of Professional Conduct* forbids *ex parte* contacts under the heading, "Impartiality . . . of the Tribunal."[41]

Case law is consistent with those authorities.[42] For example, the court in *In re Wisconsin Steel Corp.* found

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40. E. Thode, *Reporter's Notes to Code of Judicial Conduct* 53 (1973).

41. A crucial error in the Eleventh Circuit opinion is that the court never quoted or considered the statutory language regarding whether the judge's "impartiality might reasonably be questioned." Instead, the Eleventh Circuit mistakenly couched Colony Square's position exclusively in terms of an "appearance of impropriety," and found that argument to be "without merit." Pet. App. A-A8, n.14. As Justice Scalia has noted, however, "The statute doesn't really talk about appearance of impropriety. It talks about when impartiality might reasonably be questioned." *Liljeberg v. Health Services Acquisition Corp.*, No. 86-957, Transcript of Oral Argument at 22. In the present case, Judge Robinson's practice of favoring Prudential with secret *ex parte* telephone calls and meetings, and his complicity with Prudential in false denials of their illicit conduct, would necessarily lead a reasonable person to question the judge's impartiality.

42. The cases cited by the Eleventh Circuit are clearly distinguishable on their facts. *See Keystone Plastics, Inc. v. C & P Plastics, Inc.*, 506 F.2d 960, 962 (5th Cir. 1975) (Losing party knew of request for proposed findings and filed a memorandum in opposition); *Kasper Wire Works, Inc. v. Leco Engineering Mach.*, 575 F.2d 530, 543 (5th Cir. 1978) (No *ex parte* communications); *Simer v. Rios*, 661 F.2d 655, 680 (7th Cir. 1981), *cert. denied*, 456 U.S. 917 (1982) (The "contacts were made a matter of record in the case and were not clandestine in nature"); *United States v. Adams*, 785 F.2d 917 (11th Cir. 1986) (Judge's conference with prosecutor and recalcitrant witness took place with the knowledge of defendant's attorney, without any objection, was transcribed, and did not relate to merits of

(Continued on following page)

§ 455(a) applicable to a case of ghostwritten opinions even without the aggravated circumstances of this case:

> Harvester's motion to disqualify Judge McCormick is brought pursuant to 28 U.S.C. 455(a) . . .
>
> [T]here is no doubt that Judge McCormick's impartiality can reasonably be questioned. . .
>
> Even if the motion to disqualify had not been made, *the fact that Sweig was enlisted to write Judge McCormick's opinions without the knowledge of Harvester is itself an indication of bias,* at least in a broad sense, in favor of WSC and against Harvester.[43]

Judge Robinson's conduct also falls clearly within the analysis of the Fifth Circuit in *Potashnick v. Port City Construction Co.*:[44]

> Because 28 U.S.C. § 455(a) focuses on the appearance of impartiality, as opposed to the existence in fact of any bias or prejudice, a judge faced with a potential ground for disqualification ought to consider how his participation in a given case looks to the average person on the street. Use of the word

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Footnote continued—

the case); *Rushen v. Spain*, 464 U.S. 114, 104 S. Ct. 439 (1983) (Communications between judge and juror did not relate to facts in controversy nor to law applicable to the case); *Anderson v. Bessemer City*, 470 U.S. 564, 105 S. Ct. 1504 (1985) (Opposing party was provided and availed itself of the opportunity to respond at length to the proposed findings. The findings ultimately issued varied considerably in organization and content from those submitted by counsel.)

43. 48 Bankr. 753, 763-764 (N.D. Ill. 1985) (emphasis added). Even without the aggravated circumstances of this case, the court in *Wisconsin Steel* also found the judge's conduct in that case to be a violation of § 455(b).

44. 609 F.2d 1101, 1111 (5th Cir. 1980).

> "might" in the statute was intended to indicate that disqualification should follow if the reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality. Note, *Disqualification of Judges and Justices in the Federal Courts,* 86 Harv. L. Rev. 736, 745 (1973).

The appearance of Judge Robinson's participation in this case was the subject of a recent editorial in the *National Law Journal*. Referring only to the ghostwritten opinions, the editorial characterized the Eleventh Circuit's opinion as "outrageous," "utterly foreign" to "logic and fairness," and illustrative of why the profession has "such a bad public image" and a "bad name."[45]

Also relevant in construing § 455(a) are those cases holding that *ex parte* communications violate due process of law by denying the fundamental fairness of a neutral and detached judge. *See* Part II, *infra*. (Of course, due process of law requires a higher standard than § 455.)

The Eleventh Circuit concluded that case law shows that § 455(a) applies only in instances of "financial or personal conflict of interest." The only authority cited by the Eleventh Circuit for this proposition is 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure,* § 3549 (2d ed. 1984). That authority says nothing at all, however, about "financial or personal conflicts of interest"—much less does it suggest limiting § 455(a) in that way. Section 3549 does say (emphasis added):

> § 455(a) . . . makes a drastic change in practice in the federal courts. Heretofore the federal rule had been that a judge had a duty to sit if statutory

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45. Nat'l L.J., Aug. 17, 1987.

grounds for his disqualification had not been established. . . .

This provision has been authoritatively explained by the Reporter for the American Bar Association Committee that drew the Code of Judicial Conduct from which it is taken:

> *Any conduct* that would lead a reasonable man knowing all the circumstances to the conclusion that the judge's "impartiality might reasonably be questioned" is a basis for the judge's disqualification. . .
>
> Because of this general provision of § 455(a), an overly-nice reading is not required of the specific instances of disqualification spelled out in § 455(b). . . . Nothing in § 455(b) requires a judge to disqualify himself because an attorney in the case is currently representing the judge in a suit for damages, but the case seems appropriate for disqualification under § 455(a). . . . *There are many other instances in which the general provision of § 455(a) will be applicable in order to preserve the appearance of impartial justice.* . . .

Moreover, § 3547 of the same work says, "Noneconomic interests may affect a judge's ability to be or to seem impartial, but they can be handled adequately under the general provision [*i.e.*, § 455(a)] calling for disqualification if the judge's impartiality might reasonably be questioned." That is, § 455(a) "is not restricted to cases of personal bias or prejudice."[46] Rather, that subsection

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46. Bloom, *Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges*, 35 Case W. Res. L. Rev. 662, 670-671 (1985); *see also id.* at 675.

was "designed as a catch-all provision of broader scope than the combined specific disqualification provisions of subsection (b)" for financial and personal conflicts of interest.[47]

Section 455(a), which was enacted fourteen years ago, is of crucial importance to the administration of justice, as this Court recognized by granting certiorari in *Liljeberg*. The conflict of the opinion below with *Liljeberg* and the authorities cited above indicates that the need for clarification in this area extends far beyond the issues in *Liljeberg*. Errors of the magnitude of the Eleventh Circuit's opinion below should not be allowed to stand uncorrected and without guidance from this Court to the bench and bar.

II.

IN HOLDING THAT JUDGE ROBINSON'S CONDUCT DID NOT VIOLATE COLONY SQUARE'S RIGHT TO DUE PROCESS, THE ELEVENTH CIRCUIT IS IN CONFLICT WITH DECISIONS OF THIS COURT AND OF OTHER FEDERAL CIRCUIT COURTS.

A. Colony Square Was Denied The Fundamental Fairness Of A Neutral And Detached Judge.

"A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 135, 75 S. Ct. 623 (1955). Specifically, "[t]here is a constitutional right to have 'a neutral and detached judge' preside over judicial proceedings." 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, § 3549 (2d ed. 1984), quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 62, 93 S. Ct. 80, 84 (1972).

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47. *Rice v. McKenzie*, 581 F.2d 1114, 1116 (4th Cir. 1978).

Moreover, "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 150, 89 S. Ct. 337, 340 (1968). As this Court has recently reiterated, "to perform its high function in the best way, justice must satisfy the appearance of justice." *Aetna Life Insurance Co. v. LaVoie*, 475 U.S. ....., 106 S. Ct. 1580, 1587 (1986), quoting *In re Murchison*, 349 U.S. at 136, 75 S. Ct. at 625 (1955).

Those precepts were violated in this case when Judge Robinson repeatedly spoke *ex parte* with Prudential's lawyers by telephone and in his chambers, discussed his ruling with them, solicited ghostwritten opinions from them, and collaborated with them in false denials of that illicit conduct.

> [T]here is no authority in the federal courts that countenances the preparation of the opinion by the attorney for either side. That practice involves the failure of the trial judge to perform his judicial function and *when it occurs without notice to the opposing side, as in this case, it amounts to a denial of due process.*[48]

Even in administrative rulemaking, secret *ex parte* communications are inconsistent with "fundamental notions of fairness implicit in due process and with the ideal of reasoned decisionmaking on the merits." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 56 (D.C. Cir. 1977). Indeed, "[i]t is difficult to imagine a more serious incursion on fairness than to permit the representative of one of the

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48. *Chicopee Manufacturing Corp. v. Kendall Co.*, 288 F.2d 719, 724-725 (4th Cir.), *cert. denied*, 386 U.S. 825 (1961) (emphasis added).

parties to privately communicate his recommendations to the decision makers. . . . [D]ue process forbids it." *Camero v. United States*, 375 F.2d 777 (Ct. Cl. 1967).

A "more serious incursion on fairness" in fact took place in the present case, however, because one of the judicial opinions secretly prepared by Prudential was written in defense of Judge Robinson himself in response to the first (1984) motion seeking his recusal. Thus, there was not simply collusion between Prudential's lawyers and the judge in deciding crucial issues; rather, Prudential's lawyers in effect served as counsel to and advocates for the judge.

In that respect this case is closely analogous to *Rapp v. Van Dusen*, 350 F.2d 806 (3d Cir. 1965). There Judge Van Dusen openly designated the attorney for one party to serve as his counsel in connection with a recusal motion. The Third Circuit held that the judge could not thereafter remain in the case, explaining that the proper administration of justice requires of a judge not only actual impartiality, but also "the appearance of a detached impartiality." That right is denied "when a party is required to meet in his opponent an advocate who has already acted as the judge's counsel in the same litigation." 350 F.2d at 812; *Texaco, Inc. v. Chandler*, 354 F.2d 655, 657 (10th Cir. 1965), *cert. denied*, 383 U.S. 936, 83 S. Ct. 1066 (1966); *see also Smith v. Sikorsky Aircraft*, 420 F. Supp. 661 (C.D. Cal. 1976).

The circumstances in the present case are, in fact, even more serious than those faced by the Third Circuit in *Rapp*. Neither Judge Robinson nor counsel for Prudential revealed that the judge had requested Prudential's attorneys to write the opinion defending the propriety of his remaining in the case. Worse still, counsel for Prudential (who had previously denied falsely, under oath,

that there had been any *ex parte* communications) provided the judge with the following misleading justification for his opinion denying Colony Square's first motion for disqualification: "[A]ny alleged bias could only have been in a purely judicial environment which . . . cannot serve as the basis for disqualification." Pet. App. F-A73. Ironically, that statement appears in a judicial opinion that was itself the product of an *ex parte* contact initiated by the judge, and therefore not "in a purely judicial environment."

Accordingly, the holding by the Eleventh Circuit that Judge Robinson's conduct comports with fundamental fairness to Colony Square is in conflict with decisions of this Court and with those of other federal courts of appeal.

B. An Opportunity To Be Heard Is An Element Of Due Process, But It Does Not Displace The Fundamental Requirement Of A Neutral And Detached Judge.

The Eleventh Circuit held that Colony Square was not denied due process because it was given an opportunity to be heard. Pet. App. A-A10. Undoubtedly, an opportunity to be heard is an element of due process. If it were sufficient in itself, however, due process would have been satisfied in *Aetna*,[49] *Murchison*,[50] *Commonweath Coatings*,[51] *Chicopee*,[52] *Home Box Office*,[53] *Camero*,[54] *Rapp*,[55] and *Wis-*

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49. 475 U.S. ___, 106 S. Ct. 1580 (1986).
50. 349 U.S. 133, 75 S. Ct. 623 (1955).
51. 393 U.S. 145, 89 S. Ct. 337 (1968).
52. 288 F.2d 719 (4th Cir. 1961).
53. 567 F.2d 9 (D.C. Cir. 1977).
54. 375 F.2d 777 (Ct. Cl. 1967).
55. 350 F.2d 806 (3d Cir. 1965).

consin Steel.[56] Obviously an opportunity to be heard is meaningless if the judge is less than impartial, as Judge Robinson proved himself to be in the present case.[57]

An opportunity to be heard cannot cure, for example, the advantage of the "insider information" that Judge Robinson imparted to Prudential in this case.[58] Just as those with inside knowledge of corporate decisions can trade unfairly in the stock market,[59] so litigants have an unfair

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56. 48 Bankr. 753 (N.D. Ill. 1985).

57. In this case, as in *Liljeberg*, the lower court's decision was affirmed on appeal. This cannot correct the due process defect, however, because secret extra-record communications to a judge "frustrate judicial review" by concealing what actually happened below from the appellate court. *Home Box Office, Inc. v. FTC*, 567 F.2d at 57. In addition, a reviewing court must assume that a judicial opinion in the court below "provides assurance that an impartial third party analyzed the problem and independently came to a conclusion about the merits of the dispute." *In re Wisconsin Steel Co.*, 48 Bankr. at 762. If every review of a bankruptcy court's decision were *de novo*, there would be little point in having a bankruptcy court. That is why "[a]s to all findings of fact, . . . a reviewing court of a bankruptcy decision must accept the findings as found, unless they are clearly erroneous." *In re Multiponics, Inc.*, 622 F.2d 709, 713 (5th Cir. 1980). "The reviewing court deserves the assurance that the trial court has come to grips with apparently irreconcilable conflicts in the evidence . . . and has distilled therefrom true facts in the crucible of his conscience." *Keystone Plastics, Inc. v. C & P Plastics, Inc.*, 506 F.2d 960, 962 (5th Cir. 1975). In the present case, however, the opinions signed by Judge Robinson evolved not from the crucible of the judge's conscience, but from the arsenal of a combatant. Although it is said that the District Court "reexamined the merits" of the opinions written by Prudential (Pet. App. A-A10), there was in fact no rehearing of those crucial issues. More important still, this case has never received a due process consideration and disposition in the United States Bankruptcy Court, as provided by law.

58. *Cf. Carpenter v. U.S.*, 791 F.2d 1024 (2d Cir. 1986), *aff'd*, 56 U.S.L.W. 4007 (1987).

59. The first person at Prudential's headquarters to be told that Prudential "had won" the $200,000,000 Colony Square Complex was identified as Prudential's "chief real estate investment counsel." R4-175-177, 193.

tactical advantage when they have foreknowledge of judicial decisions. How an issue will be decided is "invaluable information to the lawyer and client, particularly when the other lawyers and their clients do not share in that information."[60]

Colony Square has also been prejudiced in being deprived of the sense of having received justice through the due process of law. As Professor Karl Llewellyn noted in his masterwork, *The Common Law Tradition*, a judicial opinion is addressed in part to the losing party in order to make it feel that it has been treated fairly—"a matter of importance to the polity and the law." *Id.* at 26. Also, research in behavioral psychology has borne out the importance of an impartial and detached judge in giving litigants the sense of having received justice even while losing. *See* Walker, Lind & Thibault, *The Relation Between Procedural and Distributive Justice*, 65 Va. L. Rev. 1401 (1979); LaTour, Houlden, Walker & Thibault, *Procedure: Transnational Perspectives & Preferences*, 86 Yale L.J. 258 (1976); Thibault, Walker, LaTour & Houlden, *Procedural Justice as Fairness*, 26 Stan. L. Rev. 1271 (1971).

That fundamental truth was recognized in *Wisconsin Steel*, which also involved ghostwritten opinions by the lawyers for one side. "No one likes to lose," the court observed, "but if an unfavorable decision is perceived to be the result of an impartial consideration it is usually bearable. What cannot be tolerated is an unfavorable decision that is seen as not simply wrong, but unfair."

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60. Letter of reprimand to Judge Charles B. McCormick, United States Bankruptcy Court, Northern District of Illinois, dated May 7, 1985, from Chief Judge Walter J. Cummings, United States Court of Appeals for the Seventh Circuit, at Pet. App. G-A86.

In re Wisconsin Steel Co., 48 Bankr. at 762. That is an important part of the prejudice that Colony Square has suffered in this case.

Most important, however, is the prejudice to the administration of justice when such egregious conduct—including a coverup based upon false testimony—is carried on with impunity. This kind of illicit conduct goes well beyond the appearance of injustice, which, in itself, has been recognized as constituting a denial of due process. *Aetna Life Insurance Co. v. LaVoie*, 475 U.S. ....., 106 S. Ct. 1580, 1587 (1986), quoting *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 625 (1955).

C. Judge Robinson's Lack Of Neutrality And Detachment Was Manifest In His Improper Relationship With Prudential; It Is Therefore Irrelevant Whether He Decided In Favor Of Prudential Before Soliciting The Ghostwritten Opinions From Them.

The Eleventh Circuit held that due process was served because Judge Robinson "was found to have already reached a firm decision before asking Alston & Bird to draft the proposed orders." Pet. App. A-A8. Even if the judge's self-serving assertion is accepted as fact,[61] however, that does not rectify the prejudice to Colony Square and to the administration of justice. Like the clock striking thirteen, Judge Robinson's *ex parte* collab-

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61. Colony Square was made to bear the burden of proving what transpired in the secret conversations between Judge Robinson and Prudential, who had already colluded in false denials that those conversations had ever taken place. Even so, Colony Square was not permitted to conduct a deposition of the judge. *See* Pl-21; R5-115, 118; R2-10. *Cf. In re Wisconsin Steel*, 48 Bankr. at 764. Admittedly, such a procedure would be awkward and unseemly, which suggests that a *per se* rule of disqualification is necessary in cases of *ex parte* contacts.

oration with Prudential immediately after the hearing compels doubt about all that went before.

Moreover, "[t]he judge's assertion that he had made up his mind immediately after hearing the case . . . is immaterial. Every judge has suffered a change of heart after reaching a tentative decision. Much might happen during research and opinion writing to affect the decision. 'Until the decision was signed and rendered, it was . . . subject to possible influence." *Hall v. Small Business Administration*, 695 F.2d 175, 180 (5th Cir. 1983).[62]

A classic illustration of that is Justice Sutherland's about-face in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114 (1926). Justice Sutherland had voted with a 5-4 majority to strike down municipal zoning as unconstitutional, and he had been assigned the opinion. According to tradition, he found that the opinion "just wouldn't write," asked for reargument, changed his vote, and wrote the opinion for a new 5-4 majority upholding the constitutionality of zoning.[63] Chief Justice Taft similarly switched his vote in the course of writing an opinion —indeed, one that he had assigned to himself.[64] Undoubtedly, members of this Court will be more aware than counsel of the extent to which a conscientious judge will modify a "final" decision about a case in the course of

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62. *See also* Rubin, *Does Law Matter? A Judge's Response to the Critical Legal Studies Movement*, 37 J. Legal Ed. 307, 311 (1987):

> Every judge has had the experience of attempting to write an opinion in accordance with the tentative vote, and then finding that he could not accept the result. In the craft, we say the "opinion would not write."

63. The essentials of the event are confirmed in McCormack, *A Law Clerk's Recollections*, 46 Colum. L. Rev. 710 (1946).

64. *Id.*

writing an opinion to support that decision. As Chief Justice Rehnquist has observed: "Something that sounded very sensible to a majority of the court at conference may, when an effort is made to justify it in writing, not seem so sensible. . . ."[65]

Moreover, the preparation of opinions by Prudential's lawyers and Judge Robinson was—at best—a "shared enterprise." *See Aetna Life Insurance v. LaVoie*, 475 U.S. ....., 106 S. Ct. at 1590 (Justice Blackmun concurring). "Experience teaches us that each member's involvement plays a part in shaping the court's ultimate disposition." *Id.* (Justice Brennan concurring). Thus, any participation of Prudential's lawyers in drafting Judge Robinson's opinions "posed an unacceptable danger of subtly distorting the decisionmaking process." *Id.* (Justice Blackmun concurring); *Cinderella Career and Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 592 (D.C. Cir. 1970).

Clearly, therefore, any claimed "finality" in Judge Robinson's view of the case immediately after the argument cannot justify his abdication of his judicial responsibilities by delegating those responsibilities to one of the contending parties.

D. Judge Robinson's Orders That Violated Due Process Are Void And Must Be Expunged.

The remedy for the denial of Colony Square's constitutional rights is clear and is not a matter of judicial discretion. "The United States is forbidden by fundamental law to take either life, liberty or property without due process of law, and its courts are included in this prohibition." *Bass v. Hoagland*, 172 F.2d 205, 209 (5th

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65. W.H. Rehnquist, *The Supreme Court* 300 (1987).

Cir. 1959), *citing Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019 (1937). A judgment is therefore "void . . . if the court that rendered it . . . acted in a manner inconsistent with due process of law." 11 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2862 (1973). Accordingly, the Eleventh Circuit erred in allowing Judge Robinson's opinions to stand on the record, thereby depriving Colony Square of its property without due process of law.

III.

IN FAILING TO DISQUALIFY PRUDENTIAL'S LAWYERS OR TO AWARD ATTORNEYS' FEES AND COSTS TO COLONY SQUARE, THE ELEVENTH CIRCUIT SO FAR DEPARTED FROM ACCEPTABLE JUDICIAL PRACTICE AS TO CALL FOR SUPERVISORY ACTION BY THIS COURT.

Federal courts have the inherent power to preserve their dignity and integrity and to protect the orderly administration of justice. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764-765, 100 S. Ct. 2455, 2463 (1980).

Counsel for Prudential secretly conferred with the judge regarding the merits of the case, secretly wrote judicial opinions, and covered up that illicit conduct by making false statements in one court and submitting a false affidavit in two others. Counsel thereby violated several fundamental professional norms as codified in the Georgia Code of Professional Responsibility:

> DR 7-110(B): [A] lawyer shall not communicate . . . as to the merits of the cause with a judge . . . before whom the proceeding is pending. . . . [*See also* EC 7-35].

DR 7-102(A)(5): [A] lawyer shall not . . . [k]nowingly make a false statement of law or fact.

DR 1-102(A)(4): A lawyer shall not . . . [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation.[66]

One appropriate—indeed, essential—sanction for the egregiously unethical conduct in this case is disqualification of Mr. Bird and his law firm. Another is the assessment of the excess costs, expenses, and attorneys' fees that were incurred by Colony Square as a result of Prudential's unreasonable and vexatious conduct 28 U.S.C. § 1927; *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 100 S. Ct. 2455 (1980).

Because the Eleventh Circuit in effect condoned the unprofessional conduct of Prudential's lawyers in this case by failing to order any remedy or sanction, this Court should exercise its supervisory power to make it clear that unethical conduct is not to be tolerated among members of the bar of the federal courts.

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66. Rule 110-3 of the United States District Court for the Northern District of Georgia provides that all attorneys practicing before that Court shall comply with the Code of Professional Responsibility and the Standards of Conduct contained in the Rules and Regulations of the State Bar of Georgia. These rules are substantially identical to the ABA's Code of Professional Responsibility.

CONCLUSION

The conduct of Judge Robinson and of Prudential's lawyers in this case has been scandalous. No conscientious judge or lawyer can be comfortable being part of a system of justice that tolerates repeated *ex parte* communications, the ghostwriting of judicial opinions by counsel for one side, and collusion by the judge and counsel to conceal their illicit conduct with false and misleading statements in court, in an affidavit, and in a judicial opinion.

The corruption of the integrity of federal judicial processes in this case has been compounded by the failure of the Eleventh Circuit to take any remedial measures whatsoever.

This case therefore provides the Court with the ideal opportunity to set out clear guidelines for the federal courts to follow when confronted by unethical conduct by judges and lawyers. Specifically, the Court can:

–clarify the standard of impartiality under 28 U.S.C. § 455;

–reassert judicial neutrality as an essential of due process;

–declare the remedy required when a judge fails to recuse himself despite his actual knowledge of grounds requiring recusal; and

–impress upon the federal judiciary that unethical, unreasonable, and vexatious conduct by attorneys that prejudices litigants and the administration of justice cannot be condoned, as it has been in this case.

Finally, the Court might want to grant the writ, vacate the judgment of the Eleventh Circuit, and remand

the case for reconsideration in the light of this Court's opinion in *Liljeberg v. Health Services Acquisition Corp.*

Respectfully submitted,

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APPENDIX

APPENDIX A

IN re COLONY SQUARE COMPANY, Debtor.

COLONY SQUARE COMPANY,
Plaintiff-Appellant,

v.

PRUDENTIAL INSURANCE COMPANY OF AMERICA, Defendant-Appellee.

No. 86-8464.

United States Court of Appeals,
Eleventh Circuit.
June 12, 1987.

* * *

Appeal from the United States District Court for the Northern District of Georgia.

Before VANCE and KRAVITCH, Circuit Judges, and BROWN*, Senior Circuit Judge.

VANCE, Circuit Judge:

Appellant Colony Square Company contends that certain orders issued in this case should be vacated and asks that the bankruptcy judge be disqualified because of improprieties in the manner in which he prepared these

*Honorable John R. Brown, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

orders.[1] Although we strongly disapprove of the bank ruptcy judge's methods, the record in this case does not warrant overturning the lower court's judgment.

I.

The relevant facts, as found by the district court are not in dispute. Colony Square Company (Colony) has been in bankruptcy proceedings in the United States District Court for the Northern District of Georgia since 1975. This matter was presided over in the Bankruptcy Court by Judge Hugh Robinson. The central issue in the bankruptcy proceedings concerned the right to ownership and control of the Colony Square Complex (the Complex), a large multi-use Atlanta real estate development with a fair market value substantially in excess of $100,000,000.

In 1984, appellee Prudential Insurance Company of America (Prudential) moved to compel Colony's compliance with the Chapter XII Plan under which Prudential would obtain title to the Complex. This motion was extensively briefed by both parties. A final hearing on Prudential's motion to enforce the Plan was held by Judge Robinson on June 22, 1984. The hearing lasted for almost two and one-half hours. Later that day, Judge Robinson telephoned Francis M. Bird, Jr., lead counsel for Prudential. The judge told Bird that he intended to rule in favor of Prudential. Judge Robinson outlined what he wished his order to say and asked Bird to draft it. That evening a lawyer from Mr. Bird's law firm, Alston & Bird, delivered a proposed order to Judge Robinson. Following some minor typographical correction

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1. Appellant also requests that the court disqualify Alston & Bird and assess attorneys' fees and expenses against Prudential

Judge Robinson signed the order drafted by Prudential's counsel. Colony was not notified of these *ex parte* contacts between Prudential's lawyers and Judge Robinson. Colony also was not informed that Prudential's lawyers had drafted the opinion issued by the court.

The court's orders were 'ghostwritten' on at least two other occasions. In August 1984, Colony filed a written motion to disqualify Judge Robinson on the grounds of alleged bias.[2] A hearing was held on September 17, 1984. On October 19, 1984, Judge Robinson called Frank Bird and requested that his firm prepare an opinion denying this motion. During their conversation, Mr. Bird took notes as to what the judge indicated should be covered in the decision. Based on these instructions, Alston & Bird prepared a lengthy opinion, which the judge signed. Alston & Bird also was contacted in mid-November by Judge Robinson to draft the denial of Colony's motion for reconsideration of the judge's award of attorneys' fees to Prudential. Once again, neither Judge Robinson nor Prudential notified Colony of the *ex parte* communications or the role played by Alston & Bird in drafting these opinions. It was not until months later that Colony's lawyers first learned that Judge Robinson had not drafted these three orders.

On learning that Alston & Bird had drafted these orders, Colony reasserted its motion for disqualification and the other relief sought here. The district court permitted Colony to undertake expedited discovery on this motion, and required Judge Robinson to answer written

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2. It should be noted that Colony moved to disqualify Judge Robinson on a number of occasions during the course of this lengthy litigation. These motions were consistently denied by Judge Robinson and the district court.

interrogatories. A five day evidentiary hearing was th conducted by the district court. The court also direct the parties to submit pre- and post-hearing briefs. C May 9, 1986, 60 B.R. 1003, the district court issued a fift one page opinion denying Colony's motion for relief. this opinion the district court made detailed findings co cerning the facts surrounding the issuing of the ban ruptcy judge's orders and their discovery by Colony lawyers.[3] The district court then ruled that Colony h not been denied due process noting that Colony w given notice of pending issues and an adequate opportu ity to present its arguments prior to a decision being ma by Judge Robinson. The district court dismissed as co trary to the evidence Colony's contentions that it h been prejudiced by Alston & Bird's preparation of orde for Judge Robinson. The district court emphasized th it believed the orders were correct as a matter of law wh it had originally reviewed them and that, after examini them anew in light of Colony's motion, it "continues hold this belief."[4]

II.

This circuit and other appellate courts have repeated condemned the ghostwriting of judicial orders by litigan *See, e.g., Keystone Plastics, Inc. v. C & P Plastics, In* 506 F.2d 960 (5th Cir.1975); *Bradley v. Maryland Casual Co.*, 382 F.2d 415 (8th Cir.1967); *Chicopee Mfg. Corp.*

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3. A much abridged version of these facts is set out abo

4. The district court also expressed serious reservatio about the timeliness of Colony's motion. The court noted th even while a prior disqualification motion was pending. Colon lawyers knew that Judge Robinson had previously request Alston & Bird to prepare a number of orders and suspect that the orders challenged here had been written by Alst & Bird.

Kendall Co., 288 F.2d 719 (4th Cir.), *cert. denied*, 368 U.S. 825, 82 S.Ct. 44, 7 L.Ed.2d 29 (1961). The cases admonishing trial courts for the verbatim adoption of proposed orders drafted by litigants are legion. *See, e.g., Anderson v. City of Bessemer, N.C.*, 470 U.S. 564, 105 S.Ct. 1504, 1510-11, 84 L.Ed.2d 518 (1985); *Keystone Plastics, Inc. v. C & P Plastics, Inc.*, 506 F.2d at 962; *Louis Dreyfus & Cie. v. Panama Canal Co.*, 298 F.2d 733, 737 (5th Cir. 1962); *Cuthbertson v. Biggers Bros., Inc.*, 702 F.2d 454, 458-59 (4th Cir.1983); *In re Las Colinas, Inc.*, 426 F.2d 1005, 1009 & n. 4 (1st Cir.1970), *cert. denied*, 405 U.S. 1067, 92 S.Ct. 1502, 31 L.Ed.2d 797 (1972). The bankruptcy judge here compounded this error by failing to give Colony an opportunity to respond to Prudential's proposed orders. *See Keystone Plastics, Inc. v. C & P Plastics, Inc.*, 506 F.2d at 962 & n. 4; *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 55-59 (D.C.Cir.), *cert. denied*, 434 U.S. 829, 98 S.Ct. 111, 54 L.Ed.2d 89 (1977).[5]

The dangers inherent in litigants ghostwriting opinions are readily apparent. When an interested party is permitted to draft a judicial order without response by or

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5. The Model Code of Professional Responsibility EC 7-35 (1980) provides:

> All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which he presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party. For example, a lawyer should not communicate with a tribunal by a writing unless a copy thereof is promptly delivered to opposing counsel or to the adverse party if he is not represented by a lawyer. Ordinarily an oral communication by a lawyer with a judge or hearing officer should be made only upon adequate notice to opposing counsel, or, if there is none, to the opposing party. A lawyer should not condone or lend himself to private importunities by another with a judge or hearing officer on behalf of himself or his client.

notice to the opposing side, the temptation to overreach and exaggerate is overwhelming. *See Anderson v. City of Bessemer City, N.C.*, 105 S.Ct. at 1511;[6] *Cuthbertson v. Biggers Bros., Inc.*, 702 F.2d at 459.[7] The proposed order or opinion serves as an additional opportunity for a party to brief and argue its case and thus is unfair to the party not accorded an opportunity to respond. *See In re Wisconsin Steel Corp.*, 48 B.R. 753, 761 (N.D.Ill.1985).[8] The quality of judicial decisionmaking suffers when a judge delegates the drafting of orders to a party; the writing process requires a judge to wrestle with the difficult issues before him and thereby leads to stronger, sounder judicial rulings. *See James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 314 n. 1 (5th Cir.1977), *cert. denied*, 434 U.S. 1034, 98 S.Ct. 767, 54 L.Ed.2d 781 (1978);[9] *Keystone Plastics, Inc. v. C & P Plastics, Inc.*, 506 F.2d at 962;[10]

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6. "We are also aware of the potential for overreaching and exaggeration on the part of attorneys preparing findings of fact when they have already been informed that the judge has decided in their favor." *Anderson*, 105 S.Ct. at 1511.

7. "The adversarial zeal of counsel for the prevailing party too often infects what should be disinterested findings to entrust their preparation to the successful attorney." *Cuthbertson*, 702 F.2d at 459.

8. "The opinion was, in effect, an additional brief by Sweig. 'A lawyer may not properly give a memorandum to the trial judge without a copy to the other side, even where the court asked for it.' Drinker, *Legal Ethics*, p. 78 (Columb.Univ.Press, 4th Printing, 1963) . . . [I]t is clear that each side should be given the same opportunity to persuade." *In re Wisconsin Steel Corp.*, 48 B.R. at 761.

9. "'[T]he appellate court can feel slightly more confident in concluding that important evidence has been overlooked or inadequately considered' when factual findings were not the product of personal analysis and determination by the trial judge." *James*, 559 F.2d at 314 n. 1 (quoting *Louis Dreyfus & Cie. v. Panama Canal Co.*, 298 F.2d 733, 738 (5th Cir.1962)).

10. "The reviewing court deserves the assurance that the trial court has come to grips with apparently irreconcilable

(Continued on following page)

Louis Dreyfus & Cie. v. Panama Canal Co., 298 F.2d at 737.[11] In addition, the *ex parte* communications occasioned by this practice create an obvious potential for abuse. *See In re Paradyne Corp.*, 803 F.2d 604, 612 (11th Cir.1986);[12] *In re Wisconsin Steel Corp.*, 48 B.R. at 760-61.[13]

III.

The fact that a judge allowed a litigant to draft the court's orders without notice to the opposing party does not automatically invalidate these orders however. *See, e.g., Rushen v. Spain*, 464 U.S. 114, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983) (*ex parte* communication between trial judge and juror held to be harmless error); *United States v. Adams*, 785 F.2d 917, 920-21 (11th Cir.), *cert. denied*, ... U.S. ....., 107 S.Ct. 650, 93 L.Ed.2d 706 (1986) (*ex parte* conference between judge, witness and government held constitutional); *Kaspar Wire Works, Inc. v. Leco Engineering & Mach.*, 575 F.2d 530, 543 (5th Cir. 1978) (trial court's verbatim adoption of litigant's pro-

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Footnote continued—

conflicts in the evidence . . . and has distilled therefrom true facts in the crucible of his conscience." *Keystone Plastics*, 506 F.2d at 962.

11. "[W]e must say that findings and conclusions which represent the independent judicial labors and study of the district judge are more helpful to this Court." *Dreyfus*, 298 F.2d at 737 (quoting *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 259 F.2d 398, 401 (5th Cir.1958), *cert. denied*, 361 U.S. 903, 80 S.Ct. 210, 4 L.Ed.2d 158 (1959)).

12. "*Ex parte* communications generally are disfavored because they conflict with a fundamental precept of our system of justice: a fair hearing 'requires a reasonable opportunity to know the claims of the opposing party and to meet them.' " *Paradyne*, 803 F.2d at 612 (quoting *Morgan v. United States*, 304 U.S. 1, 18, 58 S.Ct. 773, 776, 82 L.Ed. 1129 (1938)).

13. "A judge should . . . neither initiate nor consider *ex parte* . . . communications concerning a pending or impending proceeding." Code of Judicial Conduct for United States Judges Canon 3(A)(4) (1979).

posed findings subject to "clearly erroneous" standard of review); *Keystone Plastics, Inc. v. C & P Plastics, Inc.*, 506 F.2d at 963 (trial court's adoption of findings and conclusions drafted by litigant without notice to opposing party did not mandate a different standard of review); *Simer v. Rios*, 661 F.2d 655, 679-81 (7th Cir.1981), *cert. denied*, 456 U.S. 917, 102 S.Ct. 1773, 72 L.Ed.2d 177 (1982) (*ex parte* contacts between judge and litigant held not to violate due process).[14] Such orders will be vacated only if a party can demonstrate that the process by which the judge arrived at them was fundamentally unfair. *Margoles v. Johns*, 660 F.2d 291, 296 (7th Cir.1981), *cert. denied*, 455 U.S. 909, 102 S.Ct. 1256, 71 L.Ed.2d 447 (1982); *see generally Aetna Life Ins. Co. v. Lavoie*, ... U.S. ....., 106 S.Ct. 1580, 1584-85, 89 L.Ed.2d 823 (1986).

Having reviewed the record in this case, we conclude that Colony was not denied due process.[15] This result is compelled by two salient facts. First, Judge Robinson was found to have already reached a firm decision before asking Alston & Bird to draft the proposed orders.[16] Judge

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14. Appellant also contends that Judge Robinson was obligated to recuse himself sua sponte pursuant to 28 U.S.C. § 455 (a). Appellant argues that the ex parte communications and ghostwritten opinions raise the "appearance of impropriety." We find this claim to be without merit. Our review of the case law reveals no case applying § 455(a) to this type of circumstance; this provision has been uniformly applied to instances where judges have had financial or personal conflicts of interests. *See generally* C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3549 (1984).

15. As the Supreme Court has noted, "[M]ost matters relating to judicial disqualification [do] not rise to a constitutional level." *FTC v. Cement Institute*, 333 U.S. 683, 702, 68 S.Ct. 793, 804, 92 L.Ed. 1010 (1948).

16. Appellant challenges this finding of fact. The affidavits and testimony of Judge Robinson and the lawyers involved, however, clearly supports the district court's finding that the

(Continued on following page)

Robinson's decision followed a number of hearings on these issues where the judge played an active and inquiring role. He was not swayed or influenced by Prudential's proposed orders; rather, Judge Robinson directed the Alston & Bird lawyers to draft orders which reached a particular result and discussed specific points. We therefore conclude that he did not abdicate his adjudicative role. *See Anderson v. City of Bessemer City, N.C.*, 105 S.Ct. at 1511 (findings adopted verbatim from litigants given full deference where "court itself provided the framework for the proposed findings"); *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1472 (11th Cir.1986) (no due process violation where opinion was drafted by law clerk with conflict of interest since judge had already decided upon result which he announced at oral argument); *Fields v. City of Tarpon Springs, Fla.*, 721 F.2d 318, 320-21 (11th Cir.1983) (factual findings adopted verbatim from litigants affirmed where "district judge had command of the legal issues and the evidentiary proceedings, . . . was an active arbiter of the dispute, [and] did not abdicate his adjudicative role"); *Odeco, Inc. v. Avondale Shipyards, Inc.*, 663 F.2d 650, 652-53 (5th Cir.Unit A 1981) (findings adopted verbatim from litigant's (sic) given full deference where comments made in court by judge and overall record reflects that the trial court fully comprehended the factual and legal issues and adequately performed the "decision reaching process").[17]

Footnote continued—

bankruptcy judge had reached a firm decision prior to calling Prudential's lawyers. There is no evidence to indicate that this finding was clearly erroneous.

17. The "tentative" nature of the bankruptcy judge's views contributed to the vacating of the ghostwritten orders and dis-

(Continued on following page)

Second, Colony has had ample opportunity to present its arguments. The orders in question were reviewed by the district court and affirmed by that court. The order granting Prudential title also was appealed to this court, where we held that the bankruptcy court's ruling was correct as a matter of law. *In re Colony Square Co.*, 779 F.2d 653 (11th Cir.), *cert. denied*, ... U.S. ....., 107 S.Ct. 95, 93 L.Ed.2d 46 (1986).[18] In ruling on the motion now before this court, the district court reexamined the merits of the challenged orders. The district court again concluded that these orders were correct as a matter of law. The independent consideration and analysis given by the district court to those orders, both on direct review and during the subsequent proceedings on this motion, serves to correct any errors in the procedure used by the bankruptcy judge. It therefore cannot be held that Colony was denied a meaningful opportunity to be heard. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313-14, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950); *cf. Barry v. United States*, 528 F.2d 1094, 1100

Footnote continued—

qualification of the judge in *In re Wisconsin Steel Corp.*, 48 B.R. 753 (N.D.Ill.1985). There, the district court found possible prejudice because the proposed orders—submitted without notice—may have influenced the judge. *Id.* at 760-61. The lack of any evidence of independent analysis by the bankruptcy judge also led to the different result reached in that case. To the extent that *In re Wisconsin Steel Corp.* implies that ghost-written opinions are per se invalid or mandate disqualification of the offending judge and lawyers, we disagree. *See In re Cenco Inc. Securities Litigation*, 642 F.Supp. 539, 542-43 (N.D. Ill.1986).

18. In affirming the lower court's judgment, we relied principally on our reading of the Supreme Court's decision in *Central Trust Co. v. Official Creditors' Committee*, 454 U.S. 354, 102 S.Ct. 695, 70 L.Ed.2d 542 (1982). *See In re Colony Square Co.*, 779 F.2d at 655.

(7th Cir.), *cert. denied*, 429 U.S. 826, 97 S.Ct. 81, 50 L.Ed. 2d 88 (1976).[19]

IV.

The bankruptcy judge's actions in preparing these orders have little to commend them. Nevertheless, since the judge had already reached firm, final decisions and since these decisions were determined to be correct as a matter of law by the district court and appellate courts, we conclude that the process by which the orders were prepared did not prejudice the appellant and was not fundamentally unfair.

AFFIRMED.

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19. As Prudential points out in its brief, this dispute has visited two state courts, two bankruptcy courts, two district courts, two United States Courts of Appeal, and three times in the United States Supreme Court during its long and litigious history.

APPENDIX B

In re COLONY SQUARE COMPANY,
A Georgia Limited Partnership.

No. C84-1109A.

United States District Court,
N.D. Georgia,
Atlanta Division.
May 9, 1986.

* * *

ORDER

RICHARD C. FREEMAN, District Judge.

This case is before the court on Colony Square Company's ("CSC") amended motion for disqualification and other relief. An evidentiary hearing was conducted by the court with respect to this motion on October 15-19, 1985. The court directed the parties to file post-hearing briefs and took the matter under advisement.[1]

CSC's motion is predicated on the claim that attorneys from Alston & Bird, counsel for Prudential Insurance Company, wrote certain orders which were signed and issued by Bankruptcy Judge Hugh Robinson without the prior knowledge of counsel for CSC. CSC specifically requests that the court grant the following relief:

(1) Vacate and expunge the June 25, 1984 judgment and order of Judge Robinson, granting title to the Colony Square complex to Prudential ("the title order");

(2) Vacate and expunge the April 2, 1985 order and May 7, 1985 judgment of the United States District Court for the Northern District of Georgia, affirming the June 25, 1984 judgment and order of the Bankruptcy Court;

(3) Vacate and expunge the following orders of the Bankruptcy Court:

(i) the September 7, 1984 order denying CSC's motion for order setting briefing schedule, evidentiary hearing, and oral argument;

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1. CSC has also filed a motion to admit as evidence certain notes taken by Francis M. Bird, Jr., during a phone conversation with Judge Robinson. The notes were located only after the October hearing. CSC's motion to supplement the record is granted.

(ii) the September 7, 1984 order denying CSC's motion for order setting briefing schedule and oral argument;

(iii) the October 29, 1984 order denying CSC's motion for disqualification of Judge Robinson;

(iv) the November 26, 1984 order denying CSC's motion for reconsideration of an October 30, 1984 order, motion to strike affidavit of Grant T. Stein, and request for expedited hearing;

(4) Disqualify Judge Robinson from further participation in any proceedings involving CSC;

(5) Disqualify Alston & Bird from further participation in any proceedings involving CSC;

(6) Instruct the Bankruptcy Court to reconsider *de novo* all of the matters giving rise to an order vacated and expunged by this court;

(7) Award CSC and its counsel their attorneys' fees and expenses incurred in connection with each of the motions giving rise to an order authored by Alston & Bird, appeals therefrom, and this motion for disqualification and other relief.

Prudential requests that the court deny the relief sought by CSC and instead award Prudential its expenses and fees incurred in defending this motion.

I. Procedural Background

The procedural background leading up to the actions which gave rise to this motion are summarized in this court's order of April 2, 1985, and in the January 10, 1986 opinion of the Eleventh Circuit. *See In re Colony Square Company*, 779 F.2d 653 (11th Cir.1986); *In re Colony*

Square Company, Civil Action No. 84-1793A (N.D.Ga. April 2, 1985) (Freeman, J.). On October 16, 1975, CSC filed a voluntary petition under Chapter XII of the Bankruptcy Act of 1898 (formerly 11 U.S.C. § 701 *et seq.*). In an order dated March 30, 1977, Judge Robinson of the United States Bankruptcy Court for the Northern District of Georgia confirmed the Chapter XII Plan for CSC which had been proposed by Prudential, the principal secured creditor of CSC, and consented to by CSC. The Plan provided that CSC would maintain ownership of the Colony Square Complex and that Prudential would lease and manage this property. The Plan also indicated that the Bankruptcy Court for the Northern District of Georgia retained jurisdiction to enforce the Plan and retained exclusive jurisdiction over the property.

CSC subsequently failed to make cash contributions or bring its debt to Prudential current, as required by a Moratorium Agreement entered into concurrently with the lease. Prudential therefore gave CSC notice that it intended to exercise its option under the Agreement to acquire title to the property. January 29, 1982 was set as the date for tender of the debt-cancellation documents.

On January 28, 1982, CSC filed a Chapter 11 case under Title 11, United States Code, as amended by the Bankruptcy Reform Act of 1978, 11 U.S.C. § 101 *et seq.* The Chapter 11 case was filed in the Bankruptcy Court for the Western District of Pennsylvania (the "Pittsburgh bankruptcy court"). The transfer of title to the property from CSC to Prudential did not take place as scheduled.

Prudential moved to dismiss the Chapter 11 case in Pittsburgh. The motion to dismiss was initially denied by the Pittsburgh bankruptcy court. *See In re Colony*

Square Co., 22 B.R. 92 (Bankr.W.D.Pa.1982). This decision was reversed by the United States District Court for the Western District of Pennsylvania which, in November 1983, transferred the Chapter 11 case to this court. *Prudential Ins. Co. of America v. Colony Square Co.*, 29 B.R. 432 (W.D.Pa.1983). By order entered February 2, 1984, this court referred the Chapter 11 case to the Bankruptcy Court for the Northern District of Georgia. On March 26, 1984, the bankruptcy court, per Judge Robinson, dismissed the Chapter 11 case. This order, which is not challenged in the instant motion, was affirmed by this court in an order dated June 28, 1985. *In re Colony Square Company*, Civil Action No. 84-1109A (N.D. Ga. June 28, 1985) (Freeman, J.). In an opinion dated May 6, 1986, the Eleventh Circuit affirmed the order of this court. *In re Colony Square Company*, 788 F.2d 739 (11th Cir.1986).

On April 30, 1984, an involuntary Chapter 7 petition was filed against CSC in the Western District of Pennsylvania. CSC converted this action to a Chapter 11 proceeding on June 20, 1984. This matter apparently remains pending in the Pittsburgh court.

On February 9, 1984, Prudential filed a motion in the Atlanta bankruptcy court seeking to compel CSC's compliance with the Chapter XII Plan of reorganization. CSC's response was twofold, asserting first that Prudential had mismanaged the property, and second, that the automatic stay provision of section 362 of the Bankruptcy Reform Act of 1978, 11 U.S.C. § 362, prevented the Atlanta bankruptcy court from proceeding with the Chapter XII case while the second Chapter 11 action was pending in the Pittsburgh bankruptcy court. On May 14, 1984, the Atlanta bankruptcy court issued an order denying CSC's

attempt to assert mismanagement and bad faith defenses in connection with Prudential's motion to enforce the plan. This order, which also is not challenged in the instant motion, was appealed to this court. By order dated April 2, 1985, this court affirmed the Bankruptcy Court. The Eleventh Circuit has affirmed the April 2 order of this court. *In re Colony Square Co.*, 779 F.2d at 655.

On June 22, 1984, a final hearing was held by Judge Robinson on Prudential's motion to compel enforcement of the Chapter XII Plan. CSC argued at the hearing that the bankruptcy court and Prudential were enjoined from proceeding with the hearing by virtue of the automatic stay provision of Chapter 11. Judge Robinson indicated that in his opinion, the Atlanta bankruptcy court retained exclusive jurisdiction over the debt involved in the Chapter XII proceeding and that the section 362 stay was therefore inapplicable. *See* Defendant's Exhibit 130 at 40-41.[2]

On June 25, 1984, Judge Robinson entered an order enforcing the Chapter XII Plan. This order, which CSC seeks to vacate and expunge in this motion, was appealed to this court. In the April 2, 1985 order of this court, the court affirmed the June 25, 1984 order of the bankruptcy court. The ruling was appealed to the Eleventh Circuit, which denied CSC's request to stay its decision pending this court's ruling on the instant motion. Instead, the Eleventh Circuit affirmed the April 2, 1985 order of this court, holding that "the stay provision [of section 362]

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2. After Judge Robinson indicated that he would proceed with the hearing despite the pending Chapter 11 case in Pittsburgh, CSC orally moved for Judge Robinson to recuse himself. Judge Robinson denied this motion from the bench, although he later withdrew this ruling and invited a written motion and briefs.

had no effect on Prudential's action to enforce the March 30, 1977 plan, which was commenced under the former Bankruptcy Act of 1898." 779 F.2d at 655. The Eleventh Circuit premised its ruling on the Supreme Court opinion in *Central Trust Co. v. Official Creditors' Committee*, 454 U.S. 354, 102 S.Ct. 695, 70 L.Ed.2d 542 (1982), and on the Atlanta bankruptcy court's express retention of exclusive jurisdiction over the Chapter XII plan, the property, and the parties. The Court of Appeals pointed out that "[t]he affirmance is based on the appropriate reasoning of both the bankruptcy court and the district court." 779 F.2d at 655.

II. Factual Background to this Motion

A. The Title Order

As noted above, Judge Robinson held a final hearing on Prudential's motion to compel compliance with the Chapter XII Plan on Friday morning, June 22, 1984. At approximately 2:00-2:30 that afternoon, Judge Robinson telephoned Francis M. Bird, Jr., lead counsel for Alston & Bird in this litigation. At the time, Bird was in a conference with other Alston & Bird attorneys and Prudential in-house counsel. According to Bird, Judge Robinson indicated that he had decided to rule in Prudential's favor and that, due to the fact that the bankruptcy courts were about to "sunset" or "go out of existence," if Prudential wanted a written order, it would have to prepare and submit one. Bird stated that he was told by Judge Robinson that Judge Robinson had read the brief which CSC filed during the June 22 hearing and that certain points should be covered in the order. No mention was made by either Judge Robinson or Bird regarding notification to CSC.

Bird's recollection of the June 22 conversation with Judge Robinson is consistent with Judge Robinson's interrogatory response regarding this conversation. Judge Robinson stated as follows:

> When I spoke with Frank Bird prior to the entry of the June 25, 1984 order, I told him that Prudential was the prevailing party on its Motion to Enforce Court Order and to Compel Debtor to Carry Out Arrangement. I informed Frank Bird of the factual and legal basis for my decision. In the interest of time, I asked Frank Bird to be a scrivener and to prepare proposed findings of fact and conclusions of law for the court's review. He agreed to my request.

See Judge Robinson's Answer to Interropatory No. 2.[3] According to Judge Robinson, after receiving the proposed order, "[t]he court reviewed the draft, made whatever editorial, factual or legal changes it deemed appropriate and then the court entered the final order as correctly setting forth its findings and conclusions in the matter. The final version was the court's version." *Id.* at No. 3c.

After concluding the discussion with Judge Robinson, Bird excused himself from the conference and prepared an order to be submitted to the judge. The order was delivered to Judge Robinson about 6:00 that afternoon by Grant Stein, an associate with Alston & Bird. At the time that he delivered the order, Stein arranged a hearing with Judge Robinson for 9:30 a.m., Monday, June 25, 1984, for the presentation of an emergency motion.

On June 25, 1984, two hearings were held in different bankruptcy courts. In the Atlanta bankruptcy court,

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3. By orders dated September 9 and September 17, 1985, this court allowed CSC to undertake limited discovery from Judge Robinson by use of written interrogatories.

Judge Robinson held a hearing on Prudential's Motion For Issuance of Order in Aid of Jurisdiction. Prudential was represented at this hearing by R. Neal Batson, an Alston & Bird partner. CSC was represented by Jerry Blackstock and Kenneth Shapiro of Powell, Goldstein, Frazer & Murphy. Prior to the hearing, Batson delivered to Judge Robinson a corrected copy of the order which had been submitted to Judge Robinson on June 22, which contained some typographical errors. No mention was made of this order to counsel for CSC during the hearing, either by Judge Robinson or Mr. Batson. Later that afternoon, Judge Robinson called Alston & Bird to have an additional typographical error corrected. A corrected version was delivered to Judge Robinson that afternoon and signed by the judge.

At 8:00 a.m. on June 25, 1984, Judge Cosetti of the Pittsburgh bankruptcy court held a hearing on CSC's Verified Complaint and Motion for Temporary Restraining Order, Preliminary Injunction and Permanent Injunction. CSC was seeking to enjoin Prudential from taking any action against the Colony Square property. CSC was represented by Thomas Johnson of Kirkpatrick & Lockhart; Prudential was represented by Frank Bird. During the course of the arguments made to Judge Cosetti, Mr. Bird stated as follows:

> Colony is attempting to use this Court to avoid the obligations, to face the Atlanta court. We don't know how Judge Robinson is going to rule. We think we have a good case for getting Prudential's deed. But that's in the breast of that court. But they just don't want to face Judge Robinson.

Plaintiff's Exhibit 3 at 36. Mr. Bird did not reveal his discussion with Judge Robinson to Judge Cosetti or coun-

sel for CSC. In an order dated June 27, 1984, Judge Cosetti denied the motion for a temporary restraining order. In the order, Judge Cosetti expressed his belief that by virtue of the pending Chapter 11 case, section 362 protected CSC's interest in property anywhere. This view, of course, runs counter to the views expressed by the Western District of Pennsylvania, the Atlanta bankruptcy court, this court, and the Eleventh Circuit Court of Appeals. Judge Cosetti also indicated that a sense of comity required that he not engage in a dispute with the Atlanta bankruptcy court.

B. The September Orders

On August 27 and 28, 1984, six motions were argued before Judge Robinson. On August 29, 1984, Judge Robinson again contacted Frank Bird. Judge Robinson advised Mr. Bird that he had decided to deny three motions filed by CSC and he asked Bird to prepare orders. These motions were CSC's Motion for Stay of the June 25, 1984 Judgment and Order; CSC's Motion for Order Setting Briefing Schedule, Evidentiary Hearing and Oral Argument; and CSC's Motion for Order Setting Briefing Schedule and Oral Argument. Judge Robinson also asked Bird to contact counsel for CSC to inform them of his decisions.

After speaking with Judge Robinson, Bird tried unsuccessfully to reach Jerry Blackstock of Powell, Goldstein. Later that day, however, Bird was able to contact Ken Shapiro, also of Powell, Goldstein. Bird informed Shapiro of the substance of the discussion with Judge Robinson. Shapiro, in turn, communicated this information to George Cheever of Kirkpatrick & Lockhart, who circulated a memorandum regarding this information to other attorneys at Kirkpatrick & Lockhart who were in-

volved in this litigation. *See* Defendant's Exhibit 192. Bird prepared and submitted the three requested orders to Judge Robinson but did not serve copies of the orders on counsel for CSC. Judge Robinson signed the order denying the motion for a stay on September 4, 1984, and signed the two orders regarding briefing schedules on September 7, 1984. *See* CS-6, CS-7, CS-9.

C. The Disqualification Order

At the June 22, 1984 hearing in the Atlanta bankruptcy court, Judge Robinson orally denied CSC's motion for recusal. By letter dated June 25, 1984, Judge Robinson withdrew his denial of the motion and invited a written motion. PR-27. On August 31, 1984, CSC filed, pursuant to 28 U.S.C. §§ 144 and 455, a written Motion for Disqualification and Affidavit. The motion was filed with both the Atlanta bankruptcy court and with this court. *See* Defendant's Exhibits 217-220.

Prudential filed a response to CSC's motion for disqualification in both the bankruptcy and district courts. Attached to Prudential's response was an affidavit executed by Frank Bird. Among other things, Bird stated as follows:

> To the extent the second sentence implies *ex parte* contact in reference to the case, affiant denies the same. To the extent the second sentence of paragraph 4b together with the un-numbered paragraph following said paragraph, suggests a relationship tending to create favoritism (in light of the argument at pp. 9-10 of the Brief), affiant denies any such relationship. Affiant's sole contacts with Judge Robinson have been through the judicial process and not social or personal on any occasion; except for the possibility of an oc-

casional casual encounter in the courthouse, on the street, or at the Southeastern Bankruptcy Law Institute, affiant has had no *ex parte* contact with Judge Robinson, and affiant has sought to consciously avoid any improper contacts or the appearance thereof.

Plaintiff's Exhibit 4.

The motion for disqualification which was filed in the bankruptcy court was argued before Judge Robinson on September 17, 1984. *See* Defendant's Exhibit 147. On or about October 19, 1984, Judge Robinson called Frank Bird, indicated that he had decided to deny the motion for disqualification, and requested that Bird prepare an order. Mr. Bird took notes of the points which Judge Robinson indicated should be covered in the order. *See* Plaintiff's Exhibit 39. Bird assigned the task of drafting the order to Mr. Stein. Stein prepared drafts of an order, using among other sources the notes taken by Bird. The order was submitted to Judge Robinson on or about October 25, 1984, without copies being served on counsel for CSC. Judge Robinson signed the order on October 29, 1984. CS-11. The order was appealed to this court which, by order dated March 12, 1985, affirmed the order of the bankruptcy court. *In Re Colony Square Company,* Civil Action No. 84-2491A (N.D.Ga. March 12, 1985) (Freeman, J.). This court had previously denied the motion for disqualification of Judge Robinson which had been filed in this court. *In Re Colony Square Company,* Civil Action No. 84-1245A (N.D.Ga. Dec. 21, 1984) (Freeman, J.); *In Re Colony Square Company,* Civil Action No. 84-1109A (N.D.Ga. Dec. 27, 1984) (Freeman, J.).

D. November 26, 1984 Order

By order entered October 30, 1984, the bankruptcy court awarded Prudential attorneys' fees as sanctions against CSC based on a discovery dispute. On November 5, 1984, CSC filed a Motion for Reconsideration of October 30, 1984 Order, Motion to Strike Affidavit of Grant T. Stein, and Request for Expedited Hearing. On or about November 15, 1984, Judge Robinson telephoned Mr. Stein and requested that he prepare and submit an order denying CSC's motion. Stein prepared the order, using his notes from the discussion with Judge Robinson, the pleadings which had been filed in the matter, and his own knowledge of the issues. Transcript, Vol. 2 at 223. The order was submitted to Judge Robinson without a copy being served on counsel for CSC. The order was signed by Judge Robinson on November 26, 1985.

E. Knowledge and Suspicions of Counsel for CSC

CSC has argued that it did not learn of the conduct which it now challenges until May 20, 1985, when Tom Johnson raised the issue in a telephone conversation with Frank Bird. Prudential contends that the evidence adduced demonstrates that CSC either knew or suspected that Alston & Bird had authored opinions for Judge Robinson long before May 20, 1985.

Prudential points out that in CSC's original motion for disqualification, CSC sought to expunge seven orders entered by Judge Robinson: the five orders challenged in this amended motion plus the September 4 order denying its motion for a stay and an October 30, 1984 order awarding attorneys' fees to Prudential (the quantification order). CSC asserted in its original motion that its attor-

neys were not advised or aware of the *ex parte* communications leading to these orders or that Alston & Bird had authored them. Discovery undertaken to facilitate an informed ruling on this motion has since shown that CSC's original allegations were inaccurate. As discussed above, it is now clear that on August 29, 1984, Frank Bird informed Ken Shapiro of his August 29 conversation with Judge Robinson in which Judge Robinson indicated that he would rule in Prudential's favor on three motions and requested that Bird submit appropriate orders. Shapiro communicated this information to George Cheever who reported the information by memorandum to five other Kirkpatrick & Lockhart attorneys.

A careful review of the files of counsel for CSC also revealed that counsel had in fact received from Alston & Bird a copy of the proposed order which Judge Robinson entered on October 30, 1984, awarding sanctions to Prudential. *See* PR-28. Thus, of the seven orders challenged in the original June 6, 1985 motion, counsel for CSC received a copy of one of the orders from Alston & Bird and were notified of Judge Robinson's decision and request that Alston & Bird submit orders with respect to three of the orders. With respect to the five orders which CSC now asks this court to vacate, the evidence demonstrates that with regard to two of these orders, CSC was informed that Judge Robinson had decided to rule in Prudential's favor and had requested the submission of orders from Alston & Bird.

The title order, which was signed by Judge Robinson on June 25, 1984, first became known to CSC counsel on June 26, 1984, when Larry Bogart, a partner at Powell, Goldstein, received the order in the mail. Mr. Bogart testified that he telephoned Tom Johnson in Pittsburgh

to inform him of the order. As stated by Bogart, "I told [Johnson] we had received the order, it was bad news, and it was so bad it seemed to me it could have been written by Alston & Bird." Transcript, Volume 3 at 18. Mr. Bogart explained that he wanted to convey to Johnson as succinctly as possible how "bad" the order was but that he did not suspect that the order was actually written by Alston & Bird.

Mr. Bogart subsequently contacted Frank Bird regarding the possibility of obtaining a stay of the June 25, 1984 judgment and order. Bogart contends that he congratulated Bird on the victory and then discussed whether Bird would consent to a stay of the judgment. Mr. Bird presented a very different version of the June 26, 1984 discussion. According to Bird, Bogart stated: "I like your handiwork or I like what you did, or words to that effect." Transcript, Volume 1 at 95. Bird purportedly responded, "Larry you know what the custom and practice has been over there ever since you and I started." *Id.* Bird later explained how he interpreted Bogart's remark:

> A. I think [Bogart] was making a statement, I think he was asking a question at the same time. His statement was, I knew you drew this order but I want you to confirm it to me. That is the way I interpret it.
>
> Q. You are not saying he said that, it was your interpretation?
>
> A. Yes, that is what I heard him say.
>
> Q. You didn't hear him say that, in your mind that is what you understood the meaning of what he said, is that correct?

A. That's correct.

Q. Now, why didn't you simply tell him that you had prepared the June 25, 1984 order and get rid of the subject, get it out in the open?

A. As far as I was concerned it was in the open. *Id.* at 97-98.

Mr. Bogart testified that he could have used the words attributed to him by Bird. Bogart explained, however, that if he had used these words, they did not have the same meaning to him that they might have had to Bird. Bogart went on to suggest that the contrasting interpretations given the June 26 conversation could be based on the fact that Bird actually knew of the origin of the title order whereas Bogart did not possess this knowledge. Bogart denied having any suspicion at the time that Alston & Bird had drafted the title order.

Prudential points out that in terms of appearance, the orders prepared by Alston & Bird were noticeably different from orders prepared in Judge Robinson's chambers. Orders which were prepared in Judge Robinson's chambers and served on counsel for CSC were on lined paper and, on the bottom left corner, contain the designation "A-O 72-A, Rev. 8/82". In contrast the orders prepared by Alston & Bird were served on unlined paper and did not contain this designation. When CSC made an initial decision to pursue this matter, Ken Shapiro of Powell, Goldstein visually reviewed orders entered in this case. Shapiro compared the type face, the style of caption, the type of paper, and the writing style. As stated in a memorandum of Tom Johnson, "[Shapiro's] review thoroughly convinces him that Alston & Bird pre-

pared the June 25, 1984 title transfer order." Defendant's Exhibit 207.

The submission of the title order to Judge Robinson without prior notice to opposing counsel was not the first instance in which this type of procedure has been used. Ken Shapiro admitted that approximately a year before the filing of the title order, Judge Robinson had telephoned him regarding a different adversarial proceeding and requested that he submit an order on his client's behalf. Shapiro prepared and submitted the order without providing notice to or serving a copy on his opposing counsel. Judge Robinson made a number of changes to the order and had it retyped before entering it. Shapiro testified that at the time he prepared this order, he did not consider whether his action was improper but that he now believes his conduct was in fact improper.

The testimony presented at the hearing also indicates that Mr. Bogart was not the only Powell, Goldstein attorney to describe Judge Robinson's orders as "so bad they could have been written by Alston & Bird." Ken Shapiro testified that during November or early December 1984, he had a conversation with Jerry Blackstock, the lead litigation partner from Powell, Goldstein during which Blackstock used this description. Shapiro described Blackstock's remark as an "offhand comment." Transcript, Volume 3 at 93. At his deposition, Shapiro was asked what he said, if anything, in response to the remark. At the time, Shapiro answered, "I think I may have said somethink like, 'maybe so' ". *Id.* at 95. During the hearing, however, Shapiro asserted that his deposition testimony was mere speculation and that it did not occur to him until April 1985 that Alston & Bird might have prepared orders for Judge Robinson. Shapiro also claimed

that at the time he had this conversation with Jerry Blackstock, he did not recall that he himself had previously prepared an order for Judge Robinson.

Jerry Blackstock again described Judge Robinson's orders as so bad they could have been prepared by Alston & Bird on December 5, 1984, in Pittsburgh. The statement was apparently made on an elevator in the presence of Shapiro, George Cheever, Tom Johnson, and possibly another CSC attorney. Cheever testified that he took the comment to mean that the preparation of orders by Alston & Bird "was a seriously entertained suspicion." Transcript, Volume 3 at 146.

According to Blackstock, Cheever responded to his comment by saying something like "Well, you don't think they were, do you?" Blackstock's response to this query was that it was highly unlikely that Alston & Bird had prepared orders but that it would be very difficult to prove in any event. Transcript, Vol. 3 at 214, 234-35. Blackstock admitted on cross-examination that his answer at least implied the possibility that Alston & Bird had in fact prepared orders. *Id.* at 236. Blackstock went on to explain, however, that he did not believe at the time that Alston & Bird had prepared orders for Judge Robinson without notifying counsel for CSC. *Id.* at 237.

Although Mr. Blackstock himself may not have believed in December 1984, that Alston & Bird had prepared opinions for Judge Robinson, George Cheever came away from this conversation with the distinct belief that Powell, Goldstein attorneys suspected Alston & Bird of preparing orders. *Id.* at 146. Cheever testified that he gave no further thought to this matter until he read an article in the March 1985 issue of *American Lawyer* which discussed the decision in *In re Wisconsin Steel*, 48 B.R. 753 (N.D.

Ill.1985). On March 29, 1985, Cheever circulated a memorandum among the Kirkpatrick & Lockhart attorneys in which he states: "If my memory serves me well, it was the general sense among our co-counsel at the Powell, Goldstein firm that most if not all of Judge Robinson's opinions handed down in the Colony Square proceedings were in fact authored by lawyers at Alston & Bird." Defendant's Exhibit 203. Cheever reconfirmed during his testimony that he emerged from the conversation with Mr. Blackstock with the belief that it was the general sense among the Powell, Goldstein attorneys that most if not all of Judge Robinson's orders were authored by Alston & Bird. Transcript, Vol. 3 at 171. Cheever nonetheless took no action to pursue the matter at that time, despite the fact that Colony Square's motion for the disqualification of Judge Robinson, which had been filed with this court on August 31, 1984, was still pending. Other Kirkpatrick & Lockhart attorneys testified that they were aware of suspicions that Alston & Bird had prepared orders for Judge Robinson prior to receiving a copy of Cheever's March 29, 1985 memorandum. *See* Finegold Deposition, Defendant's Exhibit 229 at 36; Gespass Deposition, Defendant's Exhibit 230 at 67-68.

F. Alleged *Ex Parte* Contacts by CSC Counsel in the Colony Square Proceedings

Prudential contends that counsel for CSC has also engaged in *ex parte* communications with bankruptcy judges during the course of this litigation. Larry Bogart of Powell, Goldstein testified as follows regarding a meeting he had with Judge Robinson early on in the proceedings:

> I don't recall the year, but I do recall that there was a motion to appoint a receiver for Colony Square

Company. I called Judge Robinson's office and asked if I could have a meeting with him. Such a meeting was granted, I went to meet with Judge Robinson to inform him that I represented the non-Georgia limited partners and that if the motion to appoint a receiver were brought on for a hearing I would like to have the opportunity to be heard at that time.

Q. Was anyone else present when you met with Judge Robinson?

A. No, sir.

Q. Did anyone else have knowledge with respect to your meeting with Judge Robinson before it took place?

A. I don't think so.

Q. And the purpose of your going to see Judge Robinson was to request that if the court considered the motion for the appointment—was it a receiver or trustee?

A. It was the motion for the appointment of a receiver.

Q. And the purpose of your going to see Judge Robinson was to request him that in the event the court considered that matter to give you an opportunity to be heard?

A. That's correct.

Q. Why didn't you simply file a petition to intervene?

A. I had the feeling that it would be better if the limited partners were not officially parties to that bankruptcy matter.

Q. Well, why was that?

A. I just felt it was better to be as uninvolved with the bankruptcy matter as possible and to keep as low a profile for the limiteds as possible.

The Court: I don't understand. You wanted to keep a low profile, but at the same time you wanted an opportunity to be heard in their behalf?

The Witness: If the matter came on for a hearing, Your Honor, I did want to be heard.

The Court: So you were willing, then, not to be low profile?

The Witness: Yes, sir, if it became necessary at that time.

Transcript, Vol. 3 at 23-25. Significantly, Bogart's testimony indicates that he was merely requesting, albeit in a somewhat secretive manner, an opportunity to be heard rather than discussing the merits of the litigation.

Prudential also asserts that Kirkpatrick & Lockhart has "caused orders to be presented to the Bankruptcy Judge in Pittsburgh in matters opposed by Prudential without Prudential being given a copy of the orders at or prior to the time they were submitted to the Bankruptcy Court." Prudential's Post-hearing Brief at 43. The orders challenged by Prudential are three orders entered by Judge Cosetti which awarded interim compensation to attorneys for the debtor, including Powell, Goldstein, over the objection of Prudential. *See* Defendant's Exhibits 200, 201, 202. Defendant's Exhibit 200 has a copy of George Cheever's business card attached to it. Mr. Cheever testified that he prepared this order and sent

them to the Colony Square attorney involved in the fee application. According to Cheever, his purpose was to prepare an order which could be presented at the fee hearing. Cheever testified that he "expected Mr. Turick to show them to counsel for Prudential. And as far as I know, that's exactly what he did." Transcript, Vol. 3 at 188. Cheever could not actually say, however, whether Mr. Turick had shown these orders to Prudential counsel because he had not asked Mr. Turick, although the issue of preparation and service of these orders came up during Mr. Cheever's deposition. *See* Cheever Deposition at 118-131. Mr. Cheever testified that he also prepared the orders submitted as Defendant's Exhibits 201 and 202. Although Cheever could not say how the orders were submitted and whether they were served on counsel for Prudential he testified that a review of the docket and the orders themselves leads to the conclusion that the orders were filed in the clerk's office on December 5, 1984.

Prudential has submitted affidavits of George E. Pierce, Jr., and Michael J. Yurcheshen, co-counsel for Prudential in the bankruptcy proceeding in Pittsburgh. Pierce and Yurcheshen state that prior to the date of signature of the orders, they were not "served with draft copies . . . or otherwise notified of said proposed orders, or that the same had been filed with or in any manner offered to the court." Defendant's Exhibits 223 and 224. Yurcheshen further states that "Affiant has examined the originals of said orders in the court's file, and has ascertained from the stamps thereof that said orders were filed on December 5, 1984, bearing a stamp indicating that same was received in chambers of a bankruptcy judge rather than in the office of clerk of said court." Defendant's Exhibit 223 at ¶ 6. CSC responds that it

was not required under Bankruptcy Rule 2002 to serve the fee application and that, in any event, it took the position at the hearing that Prudential was not listed as an unsecured creditor and therefore was not entitled to notice. CSC also points out that Prudential had actual knowledge of the fee hearing and was able to obtain a copy of the bankruptcy court docket, on which the fee applications are shown. *See* Transcript, Vol. IV at 21-31.

A review of the evidence and the testimony leads this court to conclude that Defendant's Exhibits 200-202 and the affidavits of Pierce and Yurcheshen add little of value to the issues presented. It is undisputed that Prudential was aware of and actively participated in the fee hearing before Judge Cosetti. Prudential also had access to the bankruptcy court docket. *See* Defendant's Exhibit 160. The proposed orders themselves are little more than form orders which would award the specific amounts requested in the event that Judge Cosetti granted the fee application.

G. The *Wisconsin Steel* Opinion and the Filing of this Motion

A watershed event in terms of the filing of the instant motion occurred on March 6, 1985, when Judge John F. Grady of the United States District Court for the Northern District of Illinois issued his opinion in *In re Wisconsin Steel Company,* 48 B.R. 753 (N.D.Ill. 1985). The *Wisconsin Steel* opinion attracted wide press coverage in legal journals and periodicals and quickly came to the attention of counsel for both parties to this action. Subsequent to learning of *Wisconsin Steel,* CSC counsel took certain actions which culminated in the filing of this motion.

The *Wisconsin Steel* case grew out of the sale of the Wisconsin Steel Works by International Harvester Company to purchasers collectively referred to as WSC. After experiencing financial difficulties, WSC filed for reorganization under Chapter 11 of the Bankruptcy Act. International Harvester filed a proof of claim against the bankrupt estate and WSC filed a counterclaim against International Harvester, alleging fraud in the sale of Wisconsin Steel. Harvester moved to dismiss the counterclaim for failure to state a claim upon which relief could be granted. The parties briefed the motion and the matter was taken under advisement by Bankruptcy Judge Charles B. McCormick. On November 18, 1982, Judge McCormick issued an 11 page opinion denying Harvester's motion to dismiss.

After the parties undertook discovery in the adversary proceeding, a dispute arose over whether Harvester should produce certain communications which Harvester claimed were covered by the attorney-client privilege. The issue was briefed by the parties and taken under advisement by Judge McCormick. On January 7, 1985, Judge McCormick issued an 11 page opinion in which he ordered that the communications be produced.

Harvester's suspicions were subsequently aroused when questions developed over how Nachman, Munitz & Sweig ("Sweig"), counsel for WSC, had knowledge of the discovery order prior to counsel for Harvester. Harvester retained an expert who concluded on the basis of water marks and typewriting analysis that the November 18, 1982 and January 7, 1985 opinions of Judge McCormick were prepared by Sweig. These suspicions were confirmed at a hearing in the bankruptcy court

during which Harvester moved to disqualify Judge McCormick and Sweig. Judge McCormick indicated that with regard to the 1985 order, he had asked Sweig to present a proposed order after concluding that he would likely rule in WSC's favor on the motion. Judge McCormick considered the proposed order for approximately six months, during which time he marked-up a copy of the order and had his law clerk draft an order which reached the same conclusion but under a different analysis. Eventually, Judge McCormick signed the order as submitted by Sweig. Judge McCormick denied Harvester's motion for disqualification and an immediate appeal was taken to the district court.

On appeal, Judge Grady concluded that the actions of Judge McCormick and Sweig violated Canon 3A(4) of the Code of Judicial Conduct, Bankruptcy Rule 9003. Disciplinary Rule 7-110(b) of the Illinois Code of Professional Responsibility and Ethical Consideration 7-35 of the Illinois Code of Professional Responsibility. Canon 3A(4) of the Code of Judicial Conduct provides in relevant part: "Judges should accord to every person who is legally interested in a proceeding, or his or her lawyer, full right to be heard according to law, and except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding." Bankruptcy Rule 9003 contains a similar proscription for attorneys: "Except as otherwise permitted by applicable law, any party in interest and any attorney . . . of a party in interest shall refrain from *ex parte* meetings and communications with the bankruptcy judge concerning matters affecting a particular case or proceeding."

Disciplinary Rule 7-110(b) of the Illinois Code of Professional Responsibility is identical to Directory Rule 7-110(B) of the Georgia Code of Professional Responsibility and states as follows:

> In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except:
>
> (1) in the course of official proceedings in the cause;
>
> (2) in writing if he promptly delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer;
>
> (3) orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer;
>
> (4) as otherwise authorized by law.

Ethical Consideration 7-35 of both the Illinois and Georgia Codes provide:

> All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which he presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party. For example, a lawyer should not communicate with a tribunal by a writing unless a copy thereof is promptly delivered to opposing counsel or to the adverse party if he is not represented by a lawyer. Ordinarily an oral communication by a law-

> yer with a judge or hearing officer should be made only upon adequate notice to opposing counsel, or, if there is none, to the opposing party. A lawyer should not condone or lend himself to private importunities by another with a judge or hearing officer on behalf of himself or his client.

Judge Grady initially rejected the defense that Judge McCormick had already made up his mind and counsel served merely as scrivener. As pointed out by Judge Grady, only Judge McCormick could actually know whether he was influenced by the proposed order. Judge Grady noted that the ethical rules do not prohibit "prejudicial" *ex parte* communications, but *ex parte* communications. Moreover, Judge McCormick's own comments belied his contention that he had already made up his mind and that, accordingly, Harvester was not prejudiced. Judge McCormick made at best a tentative decision to rule in WSC's favor and then carefully considered the proposed order prior to making a final ruling. As pointed out by Judge Grady, had Harvester been given an opportunity to submit a proposed order, Judge McCormick may have ruled in Harvester's favor.

Judge Grady also emphasized the appearance of impropriety created by Judge McCormick's and counsel's actions, an appearance which was compounded by the concealment of these actions. As explained by Judge Grady:

> Every experienced lawyer and judge knows how important it is that litigants believe in the fairness of the process. No one likes to lose, but if an unfavorable decision decision (sic) is perceived to be the result of an impartial consideration, it is usually bear-

able. What cannot be tolerated is an unfavorable decision that is seen as not simply wrong, but unfair.

> When a judge issues an opinion, it is tangible evidence of the consideration that went into the decision. It provides assurance that an impartial third party analyzed the problem and independently came to a conclusion about the merits of the dispute. But the two opinions in question were not the work of a neutral arbiter. They were the work of Harvester's adversary, the very antithesis of what they purported to be.

48 B.R. at 762.

Judge Grady, in ruling in Harvester's favor on the appeal, granted certain relief, not as a disciplinary matter, but "for the purpose of resuscitating the integrity of [the] proceeding." *Id.* at 765 n. 8. Judge Grady vacated and expunged the orders at issue, stating that "[t]hey are not what they purport to be, and they cannot be allowed to stand." *Id.* at 766. Judge Grady withdrew the adversary proceeding from the bankruptcy court and indicated that he would decide the two motions himself.

Judge Grady also disqualified Judge McCormick from further participation in the adversary proceeding, holding that "Judge McCormick's impartiality can reasonably be questioned." *Id.* at 763. Judge Grady also indicated that "the fact that Sweig was enlisted to write Judge McCormick's opinions without the knowledge of Harvester is itself an indication of bias, at least in a broad sense, in favor of WSC and against Harvester." *Id.* at 764.

Finally, Judge Grady disqualified Sweig from further participation in the case. Judge Grady relied on the two-part test for attorney disqualification first set forth in

Woods v. Covington County Bank, 537 F.2d 804 (5th Cir. 1976), and quoted in *Kleiner v. First National Bank of Atlanta*, 751 F.2d 1193 (11th Cir.1985). Judge Grady also ruled that Nachman, Munitz & Sweig would be required to pay Harvester its attorneys' fees incurred in connection with the motion for disqualification as well as paying the fees for the time expended by substitute counsel for WSC in becoming familiar with the case.

The *Wisconsin Steel* opinion had a galvanizing effect on counsel for CSC, particularly the attorneys at Kirkpatrick & Lockhart. As explained by Mr. Cheever, who believed that the Powell, Goldstein attorneys suspected Alston & Bird of authoring most if not all of Judge Robinson's orders, the case "piqued" his interest in the question of who was preparing Judge Robinson's orders. Transcript, Vol. 3 at 200. Cheever initially pursued the matter by circulating his March 29, 1985 memorandum. Tom Johnson followed up by raising the issue with Powell, Goldstein. On April 5, 1985, Johnson wrote a letter to Ken Shapiro in which he requested that Shapiro "consider with Jerry [Blackstock] and Larry [Bogart] how we might verify that Alston & Bird has ghostwritten orders or opinions for Judge Robinson." Defendant's Exhibit 205.

The Powell, Goldstein attorneys, particularly Jerry Blackstock, apparently were not especially anxious to pursue this matter and little was done other than to discuss the issue. *See* Transcript, Volume 3 at 110-15. On May 15, 1985, Mr. Johnson wrote a second letter to Shapiro, suggesting that he visually compare orders entered in the Colony Square case with Alston & Bird briefs. *See* Defendant's Exhibit 206. Shapiro made a visual comparison of the orders and reported back to Johnson. According

to Johnson, "[Shapiro's] review thoroughly convinces him that Alston & Bird prepared the June 25, 1984 title transfer order." Defendant's Exhibit 207. On May 20, 1985, Johnson telephoned Frank Bird to discuss a number of matters with him. During the course of the discussion, Johnson asked Bird if Alston & Bird had prepared the title order. Bird confirmed that Alston & Bird had written the order and Bird and Johnson discussed how this had come about. Johnson asked Bird what other orders Alston & Bird had prepared and Bird mentioned the September orders. Johnson summarized the discussion with Bird in a memorandum which he circulated among the CSC attorneys. Defendant's Exhibit 208. The memorandum does not indicate that Bird was hesitant to reply to Johnson's inquiries or that he sought to conceal Alston & Bird's actions. Johnson and Bird spoke again on May 21, 1984, (sic) regarding the issue of ghostwritten orders. Johnson told Bird that he had taken "careful notes of our May 20, 1985 conversation and would like to review them with him to make certain they are accurate." Defendant's Exhibit 209. Johnson then reviewed the previous conversation by paraphrasing a draft affidavit which he was in the process of revising. *Id.* This affidavit formed the basis of the motion for disqualification and other relief filed on June 6, 1985.

III. Due Process Concerns

The court's determination of whether CSC is entitled to any of the relief which it seeks must be prefaced by consideration of the propriety of the conduct which it challenges. As an initial matter, the court must express its disapproval of the manner in which the orders at issue were entered. The Fifth and Eleventh Circuit Courts of Appeals have repeatedly discouraged a trial court's verbatim adoption of a party's proposed findings of fact and

conclusions of law. *See, e.g., Fields v. City of Tarpon Springs, Fla.*, 721 F.2d 318, 320 (11th Cir.1983); *Keystone Plastics, Inc. v. C & P Plastics, Inc.*, 506 F.2d 960, 962 (5th Cir.1975). The Supreme Court has also criticized this method of issuing decisions. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985). The courts have explained that the verbatim adoption of a proposed order submitted by one party presents a number of dangers, including overreaching and exaggeration by an attorney preparing an order with the knowledge that the judge has already decided to rule in that party's favor. *Id.* In addition, a reviewing court is deprived of the assurance that the trial court gave careful attention to the evidence and the arguments presented and reached a decision only after personal analysis.

The instant motion involves a situation which is potentially more serious than the adoption of one party's proposed findings of fact. In the typical situation considered by the appellate courts, a trial court will announce its decision orally and then request the prevailing party to submit a proposed order. Ideally, the losing party will be given the opportunity to comment on the proposal before the order is entered by the court. *See Keystone*, 506 F.2d at 962. While discouraged for the reasons discussed above, this procedure at least carries the safeguard that everyone concerned, including all parties and the reviewing court, are aware of the origin of the court's order.

When a judicial order is entered on the basis of a communication between the judge and the prevailing attorney without any prior notice to the losing side, the dangers discussed above are compounded. The potential for exaggeration and overreaching is heightened when

an attorney learns that he has the opportunity to draft an opinion without the knowledge of opposing counsel. The reviewing court is not only deprived of the assurance that the trial court gave appropriate attention to the issues and the evidence, but is misled into believing that the trial court performed the analysis reflected by the written opinion. The losing party, of course, is unable to bring the authorship of the opinion to the attention of a reviewing court because that party is itself kept in the dark. Finally, as apparently occurred in *Wisconsin Steel*, this procedure presents the possibility that a trial judge will reach merely a tentative decision in favor of one party and then will have this inclination solidified by reviewing the proposed order, without having the opportunity to consider a contrary result.

Despite the potential for abuse presented by the *ex parte* submission of proposed orders, Prudential contends that the manner in which the challenged orders were entered is authorized by law. In support of this argument, Prudential relies on the opinions of this court and of the Fifth Circuit Court of Appeals in *In re Georgia Paneling Supply, Inc.*, 607 F.2d 117 (5th Cir.1979), *vacated* 613 F.2d 137 (5th Cir.1979), *reinstated* 616 F.2d 893 (5th Cir.1980). In *Georgia Paneling*, this court denied a motion challenging certain bankruptcy court orders, stating that "[t]he bankruptcy court's failure to request the submission of proposed findings of fact and conclusions of law from all parties was not exemplary but neither was it clearly erroneous." *In re Georgia Paneling Supply, Inc.*, Bankruptcy Case No. 74-1628A (N.D.Ga., Aug. 29, 1978) (Freeman, J.). *See* Defendant's Exhibit 186. The order of this court was appealed to the Fifth Circuit. In the brief filed with the Court of Appeals, the trustee acknowl-

edged drafting proposed orders denying motions filed by the appellant. On appeal, the court noted that the bankruptcy judge was alleged to have engaged in *ex parte* discussions, permitted orders and an opinion to be drafted and typed by appellees or their counsel, and misrepresented the facts regarding this alleged misbehavior. The court of appeals held: "A careful examination of the record, especially those portions cited by appellants, reveals no impropriety. The allegations of misconduct are unfounded." *In re Georgia Paneling Supply, Inc.*, 607 F.2d at 118.

Georgia Paneling provides at best questionable precedential value in this case. Neither this court nor the Court of Appeals directly addressed the issue of *ex parte* preparation and submission of orders without prior notice. Moreover, *Georgia Paneling* involved a situation in which orders were prepared by the trustee, who is appointed by the bankruptcy court. The preparation of orders by a trustee is significantly different from the adversary proceeding involved in this case. The court is unable to agree with Prudential that the Fifth Circuit opinion in *Georgia Paneling* should be construed as authorizing the *ex parte* entry of orders, particularly in view of the Fifth and Eleventh Circuits' repeated admonitions against the verbatim adoption of findings of fact.

While the adoption by a trial court of an order prepared by a litigant is clearly not preferred, utilization of this procedure nonetheless does not necesssarily deny the losing party due process of law. Due process requires that a litigant be given notice and the opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950). *Ex parte* contacts between a judge and a litigant will not always

deprive the adversary of these due process attributes. When a party has been given the opportunity to participate actively in a proceeding and is not prejudiced by the *ex parte* contact, the requirements of due process have been met. *See Simer v. Rios*, 661 F.2d 655, 674 (7th Cir. 1981) ("[W]e reject any notion of due process which would place an absolute prohibition on all *ex parte* contacts or proceedings.").

It is clear that in the instant case, CSC has not been denied its due process rights. CSC was given notice of all hearings before Judge Robinson and was provided the opportunity to set forth its views on the pending motions. A review of the transcripts of these hearings demonstrates that Judge Robinson was an active participant in the proceedings and was intimately familiar with the issues. *See, e.g.*, Defendants Exhibits 130, 136, 143 and 147. After holding hearings on the issues requiring adjudication, Judge Robinson determined that he would rule in Prudential's favor and then requested that counsel for Prudential draft and submit an appropriate order. In making these requests, Judge Robinson provided counsel with a framework for the particular order to be drafted. Upon receiving a proposed draft of the order, Judge Robinson would review it and make any necessary changes. As stated by Judge Robinson, the final order reflected the thinking of the court. *See* Judge Robinson's Answer to Interrogatory No. 3d. In sum, CSC was given notice of pending issues and an adequate opportunity to present its arguments prior to a decision being made by Judge Robinson. While this court would certainly prefer that the bankruptcy court had drafted its orders without the aid of counsel, the court concludes that the procedure used did not result in a denial of due process.

In addition to the fact that CSC was not denied due process during the course of the proceedings before the bankruptcy court, CSC was also afforded the opportunity for appellate review of the key decisions of the bankruptcy court. The critical issue decided in the title order involved a narrow question of law, i.e., whether the Chapter 11 proceeding in Pittsburgh stayed the Chapter XII proceeding pending before Judge Robinson. Upon receiving an adverse ruling by Judge Robinson on this question, CSC appealed the matter to this court where the issue was briefed and taken under consideration. On April 2, 1985, this court issued an opinion which also rejected the position taken by CSC. Contrary to the intimations of counsel for CSC, this court did not simply act as a rubber stamp for the bankruptcy court. Rather the April 2, 1985 order reflects the independent consideration and analysis of this court. Of course, CSC then had the opportunity to appeal the decision of this court to the Eleventh Circuit Court of Appeals. On January 10, 1986, the Court of Appeals affirmed the ruling of this court. The court pointed out that its affirmance was based on the appropriate reasoning of both the bankruptcy court and the district court.

CSC also had the opportunity to appeal the disqualification order to this court. The disqualification order was affirmed by order of this court dated March 12, 1985. This court had previously denied a motion for disqualification of Judge Robinson which had been filed in this court. While the appeal of the disqualification order was pending before this court, counsel for CSC had actual knowledge that Judge Robinson had requested Alston & Bird to prepare at least three orders. In addition, during this time period, Mr. Cheever was under the impression

that the Powell, Goldstein attorneys believed Alston & Bird had written most if not all of Judge Robinson's orders. Yet, despite the fact that the appeal of the disqualification order was pending, CSC failed to bring this information to the attention of this court.

CSC has not shown that it was prejudiced by Alston & Bird's preparation of orders for Judge Robinson. CSC has alleged a number of ways in which it was purportedly prejudiced, none of which this court finds persuasive. First, CSC characterizes the proposed orders submitted to Judge Robinson as additional "briefs." As stated by CSC, "[h]ad Colony Square been afforded a similar opportunity, or an opportunity to comment on the proposed opinions, Judge Robinson may have decided another way." CSC's post-hearing brief at 50. As discussed above, however, the evidence produced establishes that Judge Robinson reached his decisions and then requested Alston & Bird to prepare an order which discussed certain specific points. CSC has presented no evidence that Judge Robinson made a tentative decision and then was persuaded by the proposed orders. In view of the evidence presented to this court, CSC's argument on this point is pure sophistry.

CSC next contends that it was deprived of the independent ruling of a neutral tribunal and of a fair adjudication of the issues. The court finds these conclusory contentions an insufficient basis upon which to claim prejudice. CSC also argues that Prudential gained a strategic and tactical advantage by reason of its advance knowledge of Judge Robinson's rulings. CSC's argument is mere speculation unsupported by evidence of actual prejudice.

CSC contends that Judge Cosetti may have ruled differently or faster on the motion presented to him on June 25, 1984 had he been fully informed. This argument is belied by Judge Cosetti's opinion, which expresses a sense of comity regarding the Atlanta bankruptcy court. CSC also asserts that it was unable to refute the statements set forth in Frank Bird's September 7, 1984 Affidavit. In fact, CSC could have refuted Mr. Bird's statement that he had no *ex parte* contact with Judge Robinson because CSC was aware that on August 29, 1984, Judge Robinson had contacted Mr. Bird and requested that he prepare certain orders.

As a final matter, CSC contends that this court may have ruled differently on the title order had this court been aware that the order was prepared by Alston & Bird. As discussed above, this court affirmed the title order after careful analysis of the law and the opposing arguments. This court believed on April 2, 1985, that the June 25, 1984 order of the bankruptcy court was correct as a matter of law, and this court continues to hold this belief as of this date.

The discussion above reflects the significant factual distinctions between this case and *Wisconsin Steel*. In *Wisconsin Steel*, the bankruptcy judge made at most a tentative decision to rule in favor of one party. As stated by Judge Grady, "There were, after all, only two possible alternatives—to grant the motion or to deny it. To make a tentative choice of one of two alternatives can hardly be called decisive." 48 B.R. at 763. The tentative nature of Judge McCormick's decision is important because his request for the submission of a proposed order provided Wisconsin Steel with an additional opportunity to persuade him. In contrast, there is no evidence of any

hesitancy on the part of Judge Robinson. Judge Robinson did not simply request that Alston & Bird draft proposed orders but rather, he indicated the points he wanted made in these orders. In addition, before making his request to Alston & Bird, Judge Robinson held a number of hearings with respect to the disputed issues, during which he actively questioned the attorneys and discussed his own analysis of the issues. *See, e.g.*, Defendant's Exhibit 130 at 38-48. Judge Robinson promptly entered the orders in question upon receiving and reviewing them. In sum, unlike the situation presented in *Wisconsin Steel*, in this case the Alston & Bird attorneys can fairly be described as "scriveners".

IV. Relief Requested

A. Expungement of Orders

CSC seeks to vacate and expunge the challenged orders on the basis of judicial and attorney misconduct. CSC also relies on Rule 60(b) of the Federal Rules of Civil Procedure which allows a court to relieve a party from an order by reason of (3) "fraud . . . misrepresentation, or other misconduct of an adverse party"; or (6) "any other reason justifying relief from the operation of the judgment."

As an initial matter, this court rejects CSC's contention that the challenged orders must be vacated as a matter of law without regard to whether these orders are correct or whether CSC has been prejudiced by the manner in which they were entered. Controlling precedent in this circuit establishes that an order is not void simply because it was prepared by a litigant and signed by the court rather than drafted by the court itself. *See, e.g., Fields v. City of Tarpon Springs, Fla.*, 721 F.2d 318, 320-21 (11th Cir.1983); *Hamm v. Members of Board of Regents*

of State of Florida, 708 F.2d 647, 650-51 (11th Cir.1983); *Kaspar Wire Works, Inc. v. Leco Engineering & Machine, Inc.*, 575 F.2d 530, 543 (5th Cir.1978); *Keystone Plastics, Inc. v. C & P Plastics, Inc.*, 506 F.2d 960, 962-63 (5th Cir. 1975). *See, also, United States v. El Paso Co.*, 682 F.2d 530, 540 n. 11 (5th Cir.1982); *Odeco Inc. v. Avondale Shipyards, Inc.*, 663 F.2d 650, 652-53 (5th Cir. Unit A, 1981). The court recognizes that these cases involve situations in which a trial court adopted proposed findings of fact submitted by a party rather than the *ex parte* submission of a proposed order. More significant, however, than the specific manner in which the challenged order is entered is the issue of whether the trial court adequately performed its role in the decision making process. In this case, as explained in the previous section, the evidence clearly establishes that Judge Robinson did not abdicate his decision making responsibility. Rather, "[t]he record reflects that the trial court fully comprehended the factual and legal issues and adequately performed the 'decision reaching process.'" *Odeco*, 663 F.2d at 653. The challenged orders are orders of the bankruptcy court and are entitled to be reviewed as such.[4]

CSC also has not shown that the challenged orders are erroneous and require expungement for this reason. Particular attention must be given to the title order and the disqualification order. The title order, of course, has been affirmed by this court and by the Eleventh Circuit Court of Appeals. Expunging this order and requiring *de novo* review of the issues adjudicated in the order

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4. In this regard, it is important to note that the two critical orders issued by Judge Robinson preceding the title order, the March 26, 1984 order dismissing the first Chapter 11 case and the May 14, 1984 order severing the mismanagement claim, were both prepared in Judge Robinson's chambers.

would be a futile gesture. The disqualification order was previously affirmed by order of this court dated March 12, 1985. This court found then that the October 30, 1984 disqualification order entered by Judge Robinson was not erroneous. Upon further review of this order, the court continues to believe that the order is not erroneous.

In sum, CSC has not shown either that Judge Robinson abdicated his role in the adjudicative process or that the challenged orders are erroneous. In view of these conclusions, the court also rejects CSC's claim pursuant to Rule 60(b) that misconduct by Alston & Bird attorneys deprived it of a fair adjudication of the issues. CSC's motion to vacate and expunge the orders of the bankruptcy court will therefore be denied. CSC's motion to vacate the April 2, 1985 order of this court will also be denied.

B. Disqualification of Alston & Bird

CSC moves to disqualify the law firm of Alston & Bird from further participation in these proceedings. CSC relies on the two-part test for disqualification of counsel set forth in *Kleiner v. First National Bank of Atlanta,* 751 F.2d 1193, 1210 (11th Cir.1985):

> First, although there need not be proof of actual wrongdoing, "there must be at least a reasonable possibility that some specifically identifiable impropriety did occur." Second, "a court must also find that the likelihood of public suspicion or obloquy outweighs the social interest which will be served by a lawyer's continued participation in a particular case." (citations omitted).

Prudential argues that this request is without merit and is in any event untimely.

With respect to the first part of the disqualification test, the court finds that attorneys from Alston & Bird acted improperly by not complying with Directory Rule 7-110(B) and Ethical Consideration 7-35 of the Georgia Code of Professional Responsibility. The mandate set forth in these rules is clear: A lawyer should not communicate in writing as to the merits of a cause with a judge unless a copy of the writing is promptly delivered to opposing counsel. It cannot seriously be contended that the submission of a proposed order ruling on a pending motion is anything other than a written communication as to the merits of a cause. Alston & Bird's failure to serve copies of these proposed orders on opposing counsel was inexplicable.

The second part of the disqualification test requires that the court weigh the degree to which the retention of Alston & Bird would erode public trust in the judiciary against Prudential's interest in retaining counsel of choice. *Kleiner*, 751 F.2d at 1210. The court concludes that the extraordinary circumstances presented by this litigation require that Prudential be allowed to continue to retain counsel of its choice. This costly and complex bankruptcy matter is, of course, in its second decade by now. Over the past five years, the litigation has proceeded in the Supreme Court of the United States; the Eleventh Circuit Court of Appeals; the Third Circuit Court of Appeals; the United States District Court for the Northern District of Georgia; the United States District Court for the Western District of Pennsylvania; the United States Bankruptcy Court for the Northern District of Georgia; the United States Bankruptcy Court for the Western District of Pennsylvania; the Superior Court of Fulton

County, Georgia; and the Court of Common Pleas of Allegheny County, Pennsylvania. During this time, Prudential has been continuously represented by Alston & Bird or its predecessor firm. The vast majority of the work performed by Alston & Bird is untainted by the more recent improprieties. Disqualification of Alston & Bird at this time would further prolong this already protracted litigation. In the context of these proceedings, disqualification of the firm would be an excessively harsh and drastic measure.

In concluding that Alston & Bird should be allowed to continue as counsel of record, the court has very carefully considered the representations made by Frank Bird to the Pittsburgh bankruptcy court and to this court. As noted above, Mr. Bird submitted an affidavit to this court in which he stated that he had had no *ex parte* contact with Judge Robinson. *See* Plaintiff's Exhibit 4. Prudential points out that Mr. Bird's affidavit was executed in response to CSC's contentions regarding the development of the Chapter XII Plan. In addition, Mr. Bird explained that he did not consider a request from a judge, who has already made his decision, to an attorney requesting the submission of an order to be an improper "*ex parte*" contact. According to Mr. Bird, consideration must be given to who initiated the conversation, what the conversation was about, and whether the conversation involved an attempt to influence the court. As explained by Mr. Bird, an improper *ex parte* contact "is where an attorney for a party seeks to persuade a judge to make a decision one way or the other in a matter before that judge and outside the presence of the other party." *See* Transcript, Vol. 1 at 108-110. Upon consideration of Mr. Bird's statement in the context in which it was made, as well as in

view of the ambiguity regarding whether the submission of a proposed order at the direction of the court constitutes an *ex parte* contact,[5] the court does not impute to Mr. Bird a willful desire to conceal his 1984 discussions with Judge Robinson from this court.

On June 25, 1984, three days after receiving a request from Judge Robinson to draft the title order, Mr. Bird stated to Judge Cosetti during the course of oral argument, "We don't know how Judge Robinson is going to rule. We think we have a good case for getting Prudential's deed. But that's in the breast of that court." Plaintiff's Exhibit 3 at 36. Although the court finds that this statement was unquestionably misleading, the court concludes that it does not provide grounds for the relief which CSC seeks. While this statement raises questions regarding Mr. Bird's credibility, the credibility of Mr. Bird has not proven to be a determinative factor in this proceeding. CSC has not shown that it incurred any harm as a result of Mr. Bird's misleading statement and the court does not find that Mr. Bird's conduct was so egregious as to require the disqualification of the law firm of Alston & Bird. The court also notes that the statement was made to Judge Cosetti, who of course would not be precluded from taking appropriate disciplinary action against Mr. Bird if he felt that he had been deceived.

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5. For example, Black's Law Dictionary (5th ed. 1979) defines *ex parte* as meaning: "On one side only; by or for one party; done for, in behalf of, or on the application of, one party only." The Fifth Circuit has noted that "In its more usual sense, *ex parte* means that an application is made by one party to a proceeding in the absence of the other." *United States v. Meriwether*, 486 F.2d 498, 506 (5th Cir.1973) (quoting Black's Law Dictionary (4th Ed., 1968)).

C. Disqualification of Judge Robinson

CSC seeks to disqualify Judge Robinson under 28 U.S.C. § 455. Section 455 provides in relevant part as follows:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party. . . .

A motion to disqualify a judge must be timely filed. *United States v. Slay,* 714 F.2d 1093 (11th Cir.1983); *Delesdernier v. Portierie,* 666 F.2d 116 (5th Cir.1982). A court must consider whether a party acted in a timely manner after learning of the facts which support the motion for disqualification.

The motion to disqualify Judge Robinson was not timely filed. CSC was informed on August 29, 1984, that Judge Robinson had requested that Alston & Bird prepare three orders. Two days later, CSC filed a motion in this court to disqualify Judge Robinson. In that motion, CSC alleged that Judge Robinson was personally biased and prejudiced against CSC and its counsel. In the instant motion, CSC argues that Judge Robinson's actions demonstrate *per se* bias against CSC mandating his disqualification. Yet, when CSC filed its August 31, 1984 motion for disqualification, it did not mention that only two days before the filing of the motion, Judge Robinson had requested that Alston & Bird prepare three orders. If CSC believed that the solicitation of orders by Judge Robinson

reasonably placed his impartiality in question or demonstrated personal bias or prejudice, CSC should have brought the matter to the attention of the court and obtained a ruling during 1984.

Moreover, as of December 5, 1984, George Cheever was under the impression that the Powell, Goldstein attorneys believed most if not all of Judge Robinson's orders had been written by Alston & Bird. The possibility that Alston & Bird had drafted orders for Judge Robinson appears to have been given at least some thought by Jerry Blackstock and Ken Shapiro of Powell, Goldstein. Despite the fact that CSC's motion to disqualify Judge Robinson was pending before this court from August 31, 1984, until December 21, 1984, CSC made no effort to bring these suspicions to the attention of this court. Apparently only after the *Wisconsin Steel* opinion piqued Mr. Cheever's interest in the issue was any action taken by counsel for CSC. CSC raised the matter of Alston & Bird drafting orders for Judge Robinson before this court for the first time on June 6, 1985.

Even if the motion to disqualify Judge Robinson was timely, CSC has not met its burden under section 455. As a general rule, bias sufficient to disqualify a judge must stem from extra-judicial sources and must be focused against a party to a proceeding. *Hamm v. Members of Board of Regents of State of Florida*, 708 F.2d 647, 651 (11th Cir.1983). While there is an exception to this rule for judicial conduct exhibiting pervasive bias, rulings adverse to a party will not suffice to constitute pervasive bias. *Id.* This court believes that the solicitation of orders from an attorney neither places a judge's impartiality reasonably in question nor demonstrates *per se* bias or

prejudice against the losing party. This is particularly true in this case where this court has already determined that Judge Robinson adequately performed his decision-making responsibility. Indeed, the solicitation of orders by Judge Robinson was not unique to this case. Approximately one year before Judge Robinson requested that Alston & Bird prepare the title order, Judge Robinson requested the preparation of an order in another bankruptcy matter from Ken Shapiro, one of the attorneys for CSC. At the time, it did not occur to Mr. Shapiro that this procedure might be improper. The court also notes that Judge Robinson has stated that he presumed "that counsel for the prevailing party would communicate with a Colony Square attorney regarding any draft which was prepared by counsel for the prevailing party; however I do not know whether counsel for the prevailing party did so." Judge Robinson's Answer to Interrogatory No. 8. Judge Robinson unquestionably should have ensured that counsel for CSC knew that Alston & Bird would be preparing and submitting orders rather than presuming such awareness. Nonetheless, because this court does not believe that Judge Robinson's actions demonstrate personal bias or place his impartiality reasonably in question, the court concludes that CSC has not established grounds for Judge Robinson's disqualification.

D. Attorneys' Fees

CSC seeks to recover its attorneys' fees under 28 U.S.C. § 1927 for the time spent in pursuing this motion as well as in connection with the motions which gave rise to an order prepared by Alston & Bird. This request will be denied. Prudential, on the other hand, seeks attorneys' fees under Rule 11, Fed.R.Civ.P., for the defense of this

motion. Prudential contends that the motion was not filed in good faith and that counsel for CSC failed to conduct a reasonable inquiry into the facts or the law relevant to the motion. Although the court agrees that counsel did not inquire into the facts which gave rise to this motion as carefully as they should have, the court will nonetheless deny Prudential's motion. This matter could have been avoided had counsel for Prudential served copies of the proposed orders on counsel for CSC. Prudential and its counsel will be required to bear the costs which they incurred as a result of failing to take this action.

Accordingly, CSC's amended motion for disqualification and other relief is DENIED. Prudential's motion for attorneys' fees pursuant to Rule 11, Fed.R.Civ.P., is also DENIED.

APPENDIX C

(Entered June 12, 1987)

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-8464

D.C. Docket No. 84-1109
IN RE: COLONY SQUARE COMPANY,
Debtor.

COLONY SQUARE COMPANY,
Plaintiff-Appellant,

versus

PRUDENTIAL INSURANCE COMPANY
OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

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Before VANCE and KRAVITCH, Circuit Judges, and BROWN*, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED;

It is further ordered that plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered:

June 12, 1987

For the Court:

Miguel J. Cortez, Clerk
By:
/s/ David Maland
Deputy Clerk

ISSUED AS MANDATE: DEC 3 1987

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*Honorable John R. Brown, Senior U. S. Circuit Judge for the Fifth Circuit, sitting by designation.

APPENDIX D

(Filed November 6, 1987)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 86-8464

IN RE: COLONY SQUARE COMPANY,
Debtor,

COLONY SQUARE COMPANY,
Plaintiff-Appellant,

versus

PRUDENTIAL INSURANCE COMPANY
OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Georgia

ON PETITIONS FOR REHEARING AND SUGGESTIONS OF REHEARING IN BANC

(Opinion June 12, 11 Cir., 1987, ... F.2d .....).
(November 6, 1987)

Before VANCE and KRAVITCH, Circuit Judges, and BROWN*, Senior Circuit Judge.

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*Honorable John R. Brown, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

PER CURIAM:

(X) The Petitions for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions of Rehearing In Banc are DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Robert S. Vance
United States Circuit Judge

APPENDIX E

- Judge Robinson -

Received [P] response to checkpoints (has consider all pleadings, affid., briefs, argument, etc.) -Briefs-

(Read 2x)

(1) Aff 144 doesn't apply (just conclusory affidavit - on brief and belief)

(2) This is not 455 procedure

Thinly disguised forum shopping —(3) Indicative that they want orders vacated, not just ———— recused =

[QUICKLY]

Do mention the cube contains plan proposal by another creditor & withdrawn

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Alleg that Court participated in negotiations, formulation of Plan absurd

APPENDIX F

(Filed October 30, 1984)

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CHAPTER XII

CASE NO. B75-3523A

(Judge Hugh Robinson)

IN RE:

COLONY SQUARE COMPANY, a Georgia Limited Partnership,
Debtor.

ORDER

This case is before the Court on Colony Square Company's ("CSC") Motion for Disqualification (the "Motion"). The Motion seeks disqualification of the undersigned in the instant Chapter XII case and the vacating of all orders entered heretofore by this Court concerning the enforcement of the Chapter XII plan in the above-styled case and CSC's dismissed Chapter 11 case. Case No. 84-01325A. On its face, the Motion purports to be filed pursuant to the provisions of 28 U.S.C. § 455 ("Section 455") and 28 U.S.C. § 144 ("Section 144"). For the reasons that follow, the relief sought by the Motion is denied.

Procedural History.

CSC's Chapter XII case was commenced by the filing of CSC's voluntary petition under Chapter XII of the Bankruptcy Act of 1898[1] on October 16, 1975. A Chapter XII plan of arrangement was confirmed on March 30, 1977. Among other things, this Chapter XII plan and confirmation order provided for the retention of exclusive jurisdiction over the enforcement of the Chapter XII Plan and the Colony Square real estate complex (hereinafter the "Complex") for purposes of resolving disputes concerning the effectuation of the Chapter XII plan. (Chapter XII Plan at paragraph (2) p. 15; Confirmation Order at paragraph (f), pp. 7-8.)

On January 28, 1982, CSC filed a new voluntary petition, this time under Chapter 11 of the Code, in the United States Bankruptcy Court for the Western District of Pennsylvania. Ultimately, that case was transferred to the United States District Court for the Northern District of Georgia and referred to this Court. After a series of hearings and extensive briefing of various issues, the transferred Chapter 11 case was dismissed by order entered March 26, 1984. (*Prudential Ins. Co. of America v. Colony Square Co.* (*In re Colony Square Co.*), No. 84-01325A (Bankr. N.D. Ga. March 26, 1984).[2]

While certain activity was taking place in the transferred, and subsequently dismissed, Chapter 11 case,

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1. The Bankruptcy Act of 1898, former Title 11, United States Code, will be referred to as the "Act" and the Bankruptcy Reform Act of 1978, current Title 11, United States Code, will be referred to as the "Code."

2. This matter is presently on appeal to the District Court. The substantive questions and history of these proceedings are set out in a number of orders in both cases.

parallel action was occurring in the Chapter XII case. On February 9, 1984, the Prudential Insurance Company of America ("Prudential") filed its "Motion For Relief From Stay, To Enforce Court Order and To Compel Debtor To Carry Out Arrangement." CSC filed a response and counterclaim followed by an amendment entitled "First Amended Response and Counterclaim of Colony Square Company to Prudential's Motion For Relief From Stay, To Enforce Court Order and To Compel Debtor To Carry Out Arrangement." A series of hearings and submission of briefs were held concerning Prudential's February 9, 1984 Motion. One of the various issues on which this Court ruled was the question of whether CSC could assert its claims against Prudential as an affirmative defense to Prudential's Motion to Compel Compliance with the Chapter XII Plan. On May 14, 1984, an order was entered denying CSC's request that the Court entertain its claims against Prudential in conjunction with Prudential's motion to enforce the March 30, 1977 Confirmation Order, and thereby the Chapter XII Plan. *In re Colony Square Company*, No. B75-3523A (Bankr. N.D. Ga. May 14, 1984).[3] The May 14, 1984 Order scheduled a final hearing to be held on the February 9, 1984 Motion which hearing was rescheduled to June 22, 1984 at CSC's request.

Between the time of dismissing CSC's transferred Chapter 11 case and the June 22, 1984 hearing, an involuntary petition under Chapter 7 of the Code was filed against CSC in the United States Bankruptcy Court for the Western District of Pennsylvania. The record in this case reflects the fact that the involuntary Chapter 7 case

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3. This matter is presently on appeal to the District Court.

was converted to a Chapter 11 proceeding by CSC on June 7 or on June 20, 1984. Colony's counsel announced the fact of this third case's existence to the Court at a hearing on May 3, 1984, but neither suggested nor requested any action by this Court.

At the outset of the June 22, 1984 hearing, counsel for CSC requested that the Court *sua sponte* stay the proceedings in the instant case due to the new Chapter 11 case filed in Pittsburgh, Pennsylvania. The Court declined to stay these proceedings either *sua sponte* or after an oral motion made by counsel for CSC. Counsel for CSC then requested an opportunity to brief the issue of the operation of Section 362 of the Code and its possible effect on this case. This motion was denied based on the fact that the Court had already examined that issue implicitly in prior determinations. At that time, for the first time since the transferred Chapter 11 case was referred to this Court and the instant Chapter XII became the subject of the February 9, 1984 motion, CSC raised the issue of disqualification. The Court denied CSC's oral motion for disqualification at that time and later during the June 22, 1984 hearing when it was raised again. On June 25, 1984, the Court wrote counsel for CSC a letter stating its intent to vacate the oral order denying CSC's oral Motion for Disqualification to give CSC an opportunity to present its Motion in written form with an opportunity for a hearing and argument. On August 31, 1984, CSC filed its Motion for Disqualification and a hearing was held on the Motion on September 17, 1984.

It is significant to note that the Motion was filed in both the open and active Chapter XII case and the dismissed Chapter 11 case. Presumably, this is because CSC seeks to have all orders entered in the dismissed Chapter

11 case after March 23, 1984 vacated as requested in the Motion. The dismissal of the Chapter 11 case is presently on appeal to the District Court and is beyond the jurisdiction of this Court. The analysis that follows will apply equally to the question of disqualification in the dismissed Chapter 11 case, but this Court does not believe that it can enter an order in a case over which it no longer has jurisdiction (see *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 441 F.2d 631 (5th Cir. 1971) *cert. denied* 404 U.S. 941 (1971), *reh'g denied* 404 U.S. 996 (1971)).

Legal Standards

There are two statutory provisions which address the issue of disqualification. These provisions are 28 U.S.C. §§ 144 and 455.[4] There is serious question whether Section

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4. 28 U.S.C.A. § 144.

Whenever a part to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

28 U.S.C.A. § 455(a) & (b).

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where has has (sic) a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

(Continued on following page)

144 applies to Bankruptcy Courts. *In re Foster Iron Works, Inc.*, 3 B.R. 715 (S.D. Tex. 1980). This Court is in agreement with the authorities which hold or suggest that Section 144 does not apply, but its applicability is assumed *arguendo* here.

Relying on the case of *Berger v. United States*, 255 U.S. 22 (1921), CSC has correctly asserted that under Section 144, the truth or falsity of the allegations contained in a Section 144 affidavit are not in issue. The only issue under Section 144 is whether the affidavit is legally sufficient to mandate disqualification. *U.S. v. Norton*, 700 F.2d 1072 (5th Cir. 1973); *U.S. v. Haldeman*, 559 F.2d 31,

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Footnote continued—

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it.

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy.

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

134 (D.C. Cir. 1976), *cert. denied* 431 U.S. 933 (1977); *Beland v. U.S.*, 117 F.2d 958, 960 (5th Cir. 1941). In contrast, Section 455 does not require that the movant's factual allegations be accepted as true and the Court may make inquiry into the bases for and correctness of any factual allegation. *Phillips v. Joint Legislative Committee, Etc.*, 637 F.2d 1013 (5th Cir. Unit A 1981); *State of Idaho v. Freeman*, 507 F. Supp. 706 (D. Idaho 1981).

In the instant case, CSC has filed an affidavit under Section 144.[5] This Court will analyze this case under the absolute standards of Section 144 examining CSC's affidavit only as to its legal sufficiency and not its veracity. The Court will also examine this case under Section 455.

The standard for disqualification is the reasonable man standard. Section 455 requires a judge to disqualify himself ". . . if a reasonable person, knowing all of the circumstances, would harbor doubts about his impartiality." *Hall v. Small Business Administration*, 695 F.2d 175, 179 (5th Cir. 1983). The legal sufficiency of a Section 144 affidavit ". . . is determined by ascertaining whether it contains facts which would 'convince a reasonable man that a bias exists.'" *United States v. Archabold-Newball*, 554 F.2d 665, 682 (5th Cir. 1977). *See also Davis v. Board of School Commissioners of Mobile County*, 517 F.2d 1044, 1052 (5th Cir. 1975), *cert. denied* 425 U.S. 944 (1976); *Parliament Insurance Co. v. Hanson*, 676 F.2d 1069 (5th Cir. Unit A 1982).

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5. The Committee of Holders of Partnership Interests in the dismissed Chapter 11 case is also a party to this affidavit which apparently is signed by Thomas R. Johnson, Esq., of Pittsburgh on behalf of this Committee, as its counsel. Mr. Johnson has also signed a certificate of counsel required by Section 144.

Legal Sufficiency of CSC's Affidavit Under 28 U.S.C. Section 144

CSC's affidavit is given by William J. Simpson, and Alan H. Finegold, officers of Double AV Corporation, CSC's general partner. The affidavit is given on information and belief and not on personal knowledge. Information and belief is sufficient for presentation of a Section 144 affidavit.

As addressed above, Section 144 presumes that the allegations contained in a Section 144 affidavit are true while Section 455 contains no such requirement. As will be addressed below, Section 144 also contains a timeliness requirement which some courts have interpreted to be a precondition to the blanket acceptance of the truthfulness of a Section 144 affidavit. *Phillips v. Joint Legislative Committee, Etc.*, 637 F.2d 1014 (5th Cir. 1981). In the interest of judicial economy, in the following analysis under Section 144, the Court will also address the truthfulness (Section 455) of the allegations contained in CSC's affidavit.

The first paragraph of CSC's affidavit which contains any allegation of bias and prejudice is paragraph 3. Paragraph 3 states that CSC believes ". . . truly in good faith . . . ." that the Court has a personal bias and prejudice against CSC and its counsel and in favor of Prudential and its counsel. Paragraph 3 is purely a conclusory allegation which is insufficient under both Section 144 and Section 455. *Hodgeson v. Liquor Salesman Union Local No. 2 of State of New York*, 444 F.2d 1344, 1348 (2nd Cir. 1971); *U.S. v. Haldeman*, 559 F.2d 131, 134, (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977).

Paragraph 4 of CSC's affidavit contains certain allegations as to the source of this Court's alleged bias and

prejudice. Subparagraph (a) of paragraph 4 states that the Court was actively involved in the process leading to confirmation of the Chapter XII plan as a ". . . motivating force, conciliator, mediator, leader and arbiter of the proceedings. . . ." Subparagraph 4(a) also states that the Court approved the Chapter XII plan and entered the March 30, 1977 Order confirming the Chapter XII plan. Paragraph 4 does not go so far as to specifically allege or imply that the Court sat at the negotiating table with the parties.[6] Further, and more importantly, the affidavit submitted by CSC does not assert that the Court acted other than in a purely judicial capacity. It is well established that the source of bias, if any exists, must arise from an extrajudicial arena. *U.S. v. Grinnell Corp.*, 384 U.S. 563 (1966); *U.S. v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976), *cert. denied* 431 U.S. 933 (1977); *Curl v. International Business Machines Corp.*, 517 F.2d 212, 214 (5th Cir. 1975), *cert. denied*, 425 U.S. 843 (1976); *Bowling v. Matthews*, 511 F.2d 112, 114 (5th Cir. 1975). Under Section 455, on the other hand, to the extent that CSC's allegations in paragraph 4(a) of the affidavit seek to imply that the Court took an active part, or any part, in the formulation of the Chapter XII Plan, the allegation is false, based on both Prudential's affidavits and this Court's knowledge of its own participation in the Chapter XII process.

Paragraph 4(b) of CSC's affidavit states that current counsel for Prudential has had a long involvement in the

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6. In this regard, the Court does not read the affidavit's language as suggesting that the Court's alleged role was more than the inherent result of the proper, detached judicial function. Affidavits on personal knowledge submitted by Prudential, evidencing a contrary reading on Prudential's part, are not necessary in this context, and the Court has ignored them on the Section 144 issue.

Chapter XII case and that Colony's Pittsburgh counsel are ". . . relative newcomers to the litigation, are not Atlanta natives, are northerners and relatively unknown . . . ." Paragraph 4(b) also asserts that CSC believes the Court perceives CSC's Pittsburgh's counsel as "overly tenacious obstructionists. . . ."

In addition to Pittsburgh counsel, Colony is represented by the Atlanta law firm of Powell, Goldstein, Frazer & Murphy ("PGF&M"). PGF&M has been involved with this case since before confirmation of Colony's Chapter XII Plan. Furthermore, all knowledge of the Court addressed in paragraph 4(b) of the affidavit arose in a purely judicial context. Even if the allegations contained in paragraph 4(b) of the affidavit were true (and they are not), on its face it shows that any alleged bias would have been the result of contacts in a purely judicial environment which, as addressed above, cannot serve as the basis for disqualification.[7]

Paragraph 4(a) of CSC's affidavit appears to be directed primarily toward the Chapter 11 case. As addressed earlier, the Chapter 11 case was dismissed and is presently on appeal to the United States District Court for the Northern District of Georgia. Thus, the Court is without jurisdiction to rule concerning disqualification in that case. However, the inverse of the contention that because the Court handled the dismissed Chapter 11 case or that because the Court handled the Chapter XII

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7. Improper bias, or the appearance thereof, would be a predisposition or prejudice which would undermine the Court's ability to give impartial consideration to the pleadings, evidence, and arguments of counsel. As each issue is presented, tried, briefed, and argued, at some point, after due consideration of these, the Court becomes persuaded, as it must, that a decision is mandated one way or the other. This is simply a part of any adversary system.

case prior to confirmation of the Chapter XII plan, the Court may not continue to proceed in the Chapter XII case is without merit. The fact that a Court gains knowledge concerning a proceeding from a related proceeding is not a basis for disqualification. Thus, in *U.S. v. Haldeman,* 559 F.2d 31 (D.C. Cir. 1976), *cert. denied,* 431 U.S. 933 (1977), disqualification was not required where The Hon. John J. Sirica gained knowledge during a series of Watergate related criminal cases. *U.S. v. Haldeman, supra,* 559 F.2d at 133. *See also U.S. v. Wayne County Department of Health, Air Pollution Control Division,* 571 F. Supp. 90 (E.D. Mich. 1983); *Southerland v. Iron,* 628 F.2d 978, 980 (6th Cir. 1980); *Bonds v. U.S.,* 241 F.2d 252, 254 (9th Cir. 1956). None of the matters about which CSC complains in its affidavit arose in an extra-judicial context.

Paragraph 5 of CSC's affidavit addresses the following five areas which CSC states evidence the Court's bias against CSC. These areas are the Court's alleged refusal (1) to continue hearings; (2) to admit certain evidence at the June 22, 1984 hearing; (3) to consider CSC's affirmative defenses; (4) to hear further argument concerning the effect of Section 362 of the Code on the Chapter XII case; and (5) the existence of a glass cube containing a miniature printed version of "the Chapter XII plan."

The record in this case reflects only one instance in which CSC made a formal written motion to continue a hearing because of scheduling conflicts or for other reasons. That motion was granted over Prudential's objection and resulted in the rescheduling from June 7, 1984 to June 22, 1984 of what ultimately was the final hearing on Prudential's February 9, 1984 Motion to compel com-

pliance with the Chapter XII Plan. CSC also sought an extension concerning the issue of the right to a jury trial contained in its counterclaims. This issue was mooted by CSC's voluntary withdrawal of the jury trial demand on April 4, 1984. In the dismissed Chapter 11 case, CSC requested the rescheduling of the March 22, 1984 hearing, which request was denied. The March 22, 1984 hearing resulted in a consent agreement concerning the disposition of the various adversary proceedings which were dismissed when the Chapter 11 case was dismissed. Even if the Court had not rescheduled any hearings in this case, that would not be a basis for disqualification. The Court has the inherent right to control its own calendar. In this case, where no fewer than nine attorneys have signed pleadings in representation of CSC, it is difficult to conceive of circumstances where the denial of a continuance would automatically constitute an abuse of discretion.

The Court's determination at the June 22, 1984 hearing and the August 27, 1984 hearing of what evidence and argument to receive is within the inherent authority of the court. CSC should not have been surprised by any ruling at the June 22, 1984 hearing which refused to allow it to present evidence concerning its "affirmative defenses" or to hear legal argument concerning CSC's entitlement to present these affirmative defenses as a bar to its compliance with the Chapter XII plan. As addressed earlier, on May 14, 1984, after extensive argument and briefing, the Court ruled that CSC would not be allowed to assert its claims against Prudential as a bar to its compliance with the Chapter XII plan. The Court instead preserved these affirmative defenses as money damage claims. There was no reason to allow further argument on a matter that had already been decided.

The August 27, 1984 hearing to which CSC refers in its affidavit was a hearing on a series of approximately six motions. One of the principal matters before the Court on August 27, 1984 was CSC's Motion for a Stay Pending Appeal of the June 25, 1984 Order Enforcing the Chapter XII Plan.[8] At that hearing, CSC again sought to present evidence concerning its affirmative defenses, which again was not allowed, consistent with the May 14, 1984 Order. CSC also requested additional time to present evidence concerning a bond and objected to Prudential's presentation of evidence on that issue. The issue of a bond is basic to a hearing on a stay pending appeal. The Court's refusal to allow CSC additional time to prepare to argue an issue which was timely before the Court and which CSC had already briefed was not an abuse of discretion. The June 25, 1984 order - the object of the motion - had been entered more than two months prior to the August 27 hearing, and had twice been stayed by consent order, to enable the parties to proceed in an orderly manner with the stay question. Colony could hardly claim to have been surprised or short-changed for time. Furthermore, the foregoing constituted judicial acts which cannot be the basis for a finding of bias or prejudice.

CSC has also cited the Court's refusal to have additional argument or briefing concerning the issue of the application of Section 362 code to the instant proceeding as an example of bias and prejudice. As the Court stated at the June 22, 1984 hearing, its opinion concerning the operation of Section 362 was implicit in prior rulings and this implicit determination was made explicit in the June 25, 1984 Order enforcing the Chapter XII plan and the

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8. This order is on appeal to the District Court.

September 7, 1984 Order denying CSC's Motion for a Briefing Schedule on the Section 362 issue. Simply put, the operation of Section 403(a) of the Code and the Court's determination of the effect of the retention of jurisdiction provisions of the Chapter XII plan and the confirmation order make the issue of the operation of Section 362 very clear and did not require rebriefing or reargument.

The final issue raised in paragraph 5 of CSC's affidavit is the existence of a cube containing a miniature version of the Chapter XII plan. A Chapter XII plan is in this cube but it is a miniature copy of the Chase Manhattan Chapter XII plan which had been withdrawn, and not the Chapter XII plan confirmed in this case. Even if the subject cube contained a copy of "the" Chapter XII plan, the retention of such a novelty item would not raise the spectre of bias in the eyes of a reasonable man.

In summary, every allegation of bias and prejudice contained in CSC's affidavit is legally insufficient to meet the standards for disqualification contained in Section 144. Even if all the allegations contained in CSC's affidavit were true (and they are not), a reasonable man would not find that bias exists. Furthermore, CSC's characterization of the Court's conduct in the Chapter XII case and the dismissed Chapter 11 case is misleading. To the extent that purely judicial conduct can serve as a basis for disqualification (which it cannot, as addressed above), paragraph 5 of the affidavit seeks to make it appear that the Court made rulings in this case with little or no consideration. This is not accurate and the record fully reflects the Court's thorough consideration of the matters pending before it. As addressed above, Section 455 allows the Court to inquire into the veracity of the

allegations contained in an affidavit of bias and prejudice. CSC's mischaracterization of what has occurred in this case is without substance.

CSC's use of the Court's May 14, 1984 ruling and evidentiary and other rulings made during the course of this case as "evidence" of the Court's bias and prejudice is indicative of CSC's true complaint. CSC seeks disqualification based on the Court's rulings in the instant case and related matters. The law in this circuit is that:

> "A motion for recusal may not generally be predicated upon the court's rulings in a case, but must be based on bias generated from a source outside the context of the judicial proceeding. (citations omitted)."

In Re Veteto, 701 F.2d 136, 140 (11th Cir. 1983), *cert. denied,* 103 S. Ct. 3548 (1983); *see also U.S. v. Roca-Alvarez,* 451 F.2d 843, 848 (5th Cir. 1971); *Molinaro v. Hart Electronics Corporation of Scranton,* 516 F. Supp. 19 (M.D. Pa. 1981), *aff'd* 696 F.2d 982 (3rd Cir. 1982). The fact is that CSC's Motion was presented in an effort to forum shop due to dissatisfaction with court rulings. This is clearly shown by CSC's request that all orders regarding the dismissed Chapter 11 case and enforcement of the Chapter XII plan be vacated, counsel for Colony's statements at the September 17, 1984 hearing in response to inquiry from the Court,[9] and certain statements from CSC's "Brief in Response to Checklist of Applicable Legal Principles Regarding Issue of Disqualification." In its brief, CSC makes the following statement as to why the Motion should be found timely under Section 144:

> "Here, CSC was necessarily delayed in bringing the motion now under consideration, at first because the

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9. Transcript of September 17, 1984 Hearing at pp. 54-57.

> venue of the proceeding was so long uncertain. Then, after the Chapter 11 proceeding was transferred to the Northern District of Georgia, CSC's respect for Judge Robinson and counsel's belief that he could decide, without bias or partiality, the two conflicting cases with which he was then presented, further delayed CSC's decision to seek the Judge's disqualification. That this belief was misplaced, however, only became clear when the Judge refused CSC's counsel the opportunity even to present argument concerning a new bankruptcy proceeding initiated as an involuntary proceeding in the United States Bankruptcy Court for the Western District of Pennsylvania." Brief at page 13.

The timeliness of CSC's motion will be addressed below. However, the foregoing indicates that CSC's motion is a thinly disguised attempt at forum shopping due to dissatisfaction with court rulings.

Timeliness.

Sections 144 and 455 both contain timeliness requirements. Section 455's timeliness requirement is implied while Section 144's timeliness requirement is explicit. *U.S. v. Slay,* 714 F.2d 1093 (11th Cir. 1983), *cert. denied,* ..... U.S. ....., 104 S. Ct. 729 (1983); *Delesdernier v. Porterie,* 666 F.2d 116, 121-22 (5th Cir. 1982), *cert. denied,* ..... U.S. ....., 103 S. Ct. 86 (1983); *U.S. v. IBM Corporation,* 618 F.2d 923 (2nd Cir. 1980); *Hawaii-Pacific Venture-Capital Corporation v. Rothbard,* 436 F. Supp. 230 (D. Hawaii 1977). The only thing that CSC did not know at the time the dismissed Chapter 11 case was referred to this Court and at the time Prudential filed

its Motion to compel compliance with the Chapter XII Plan was how the Court would rule. The Court had at that time both cases before it and the parties knew that the Court would be conducting both matters. Specifically, as to the dismissed Chapter 11 case, a more classic example of untimeliness could not exist than raising a disqualification motion after a case had been dismissed and was on appeal where the facts which form the basis for the disqualification motion were in the possession of the party at the time the case was first commenced in this district.

At the September 17, 1984 hearing (Transcript, p. 56), CSC's counsel was asked why they waited - what was different since the case was first referred to this Court. Counsel responded that CSC expected the transfer of the Chapter 11 case to have an effect on the Chapter XII case, so the former could proceed - and counsel said CSC was told that the undersigned was fair. The first is a statement of faith or expectation in a theory of their case which was first rejected by U.S. District Judge Bloch's decision in April, 1983 (*Prudential Ins. Co. of America v. Colony Square*, 29 B.R. 432 (W.D. Pa. 1983))[10]. After several hearings, many briefs, and substantial oral argument, this Court disagreed with CSC's legal position. If the decision is incorrect, the appellate courts will set it straight, but the result is not the product of bias. CSC waited to see what would happen, and now seeks to start over with a new judge.

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10. It might be argued persuasively that that ruling became the law of the case in the dismissed Chapter 11 case. The parties' arguments showed their adamant disagreement as to its effect. This Court considered the issues relative to repetitive filings as though they were presented *de novo*, and ultimately agreed with Judge Bloch's ruling.

CONCLUSION

In conclusion, the Court finds CSC's affidavit to be legally insufficient to require disqualification under the strict standards of Section 144. CSC's affidavit would not cause a reasonable man to find bias in fact and neither CSC's affidavit nor the true facts in this case would cause a reasonable man to find an appearance of impropriety on the Court's behalf. CSC's motion is little more than a collateral attack representing an attempt to avoid court rulings with which it is displeased. Furthermore, CSC's motion is untimely. Taking the affidavit at face value under Section 144, the Court finds that in its separate parts and as a whole, it is legally insufficient to require disqualification. Upon further inquiry under Section 455, the Court finds that in numerous places, the allegations are contrary to fact, as noted above, and that the motion and affidavit, in their separate parts and as a whole, are legally insufficient to require disqualification. Were the Court to find that disqualification is appropriate on either statutory basis, or for any reason, the Court finds that there is no basis for going further and vacating all its rulings in both cases, or in either of them.

WHEREFORE, for the above-stated reasons, it is

ORDERED, that Colony Square Company's Motion for Disqualification is denied.

IT IS SO ORDERED this 29 day of October, 1984.

/s/ Hugh Robinson
Hugh Robinson
United States Bankruptcy
Judge

APPENDIX G

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

Chambers of
Walter J. Cummings
Chief Judge
219 South Dearborn Street
Chicago, Illinois 60604

FOR MAY 7TH RELEASE TO THE MEDIA

May 7, 1985

Honorable Charles B. McCormick
United States Bankruptcy Court
Northern District of Illinois
219 South Dearborn Street
Chicago, Illinois 60604

Dear Judge McCormick:

As I advised you by letter on May 1, the Judicial Council of the Seventh Federal Circuit has completed an investigation of a written misconduct complaint under 28 U.S.C. § 372(c)(1) concerning your conduct of the *Wisconsin Steel Company* Chapter 11 reorganization proceedings in which International Harvester Co. filed a claim of $146,627,830 against the bankrupt estate. Subsequently, debtor Wisconsin Steel Company filed a counterclaim against Harvester alleging fraud in Harvester's sale of Wisconsin Steel to Envirodyne Industries, Inc. These proceedings are numbered 80 B 03766 through 80 B 03773 and Adversary No. 81 A 0442, and still pend in the United States District Court for the Northern District of Illinois in Chicago.

On March 29 of this year, I advised you that in the investigation of the complaint, the following documents were reviewed: correspondence from District Judge John Grady concerning this matter; the transcript of the January 22, 1985, proceedings before you; the transcript of proceedings later that day before Judge Grady; Harvester's motion to disqualify you and for other relief filed on that same date; your January 29, 1985, reply to that motion; Judge Grady's order and memorandum opinion of March 6, 1985, disqualifying you from further participation in the *Wisconsin Steel Company* case, ordering its reassignment to another bankruptcy judge, and ordering you and Wisconsin Steel's counsel to list other orders similar to those you issued on November 18, 1982, and January 7, 1985, and involved in the complaint.

On March 27, 1985, you advised the district court that your December 3, 1981, order in the *Wisconsin Steel Company* case might have been issued under similar circumstances to the November 18, 1982, and January 7, 1985, orders. At the same time, Wisconsin Steel's counsel advised Judge Grady that your December 3, 1981, order requiring parties other than International Harvester to produce certain documents for Wisconsin Steel's inspection, and your March 15, 1982, order denying the Chicago, West Pullman & Southern Railroad Co.'s application for payment of $75,180 demurrage charges by Wisconsin Steel were prepared by Wisconsin Steel's counsel pursuant to your request through your law clerk. Your letter to me of April 11, 1985, confirmed that you entered the four orders after directing your law clerk to obtain drafts from Wisconsin Steel's counsel which you released as your own. The January 7, 1985, ruling was denominated an "Opinion and Order" and consisted of 11 pages and contained nu-

merous citations. The November 18, 1982, decision was labelled "Order" and was of the same length and also studded with citations. The December 3, 1981, "Order" was only four pages but referred to numerous federal opinions. Finally, the March 15, 1982, "Order" was five pages and again referred to prior federal cases and one from Colorado. At least colloquially all of them might well be denominated opinions and represent considerable scholarship.

The record reveals that in the above four instances, you did not reveal to any counsel other than Wisconsin Steel's how you planned to decide the matters covered by those orders, and that through your law clerk you directed Wisconsin Steel's counsel to prepare the drafts which you eventually released without change under your name. Your letter of April 11 indicates that you have no recollection of other *ex parte* communications with counsel for a litigant requesting its counsel directly, or through your law clerk upon your direction, to prepare orders in cases being litigated before you without notifying opposing counsel in advance of your decisions and requests.

By resolution of the Judicial Conference of the United States, the Code of Conduct for United States judges is applicable to bankruptcy judges and United States magistrates as well as to the other federal judges. Canon 1 requires a judge to "uphold the integrity and independence of the judiciary" and Canon 2 requires a judge to "avoid impropriety and the appearance of impropriety in all his activities." Particularly applicable to the facts brought to the attention of the Judicial Council of the Seventh Federal Circuit with respect to yourself, Canon 3A(4) provides:

> A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

The four instances brought to our attention in which you directed your law clerk to have Wisconsin Steel's counsel prepare proposed orders in its favor and which you subsequently released without change and without prior notice to Harvester's counsel clearly violate all three of the above Canons. These violations would not have come to light except that counsel for Harvester discovered that your order of January 7, 1985, had been received by counsel for Wisconsin Steel a day before its receipt by counsel for Harvester. This prompted the law firm representing Harvester to conduct an investigation which disclosed that your November 18, 1982, and January 7, 1985, orders had been prepared by counsel for Wisconsin Steel on paper bearing their watermark and their type face.

If you had announced your rulings in advance to both concerned parties and then in the presence of both had directed counsel for one of them to prepare orders carrying out your rulings, there would have been no violation of the Canons. Because no secrecy is involved, it is also blameless for a judge to ask counsel for both sides to prepare and serve on the other side proposed findings of fact and conclusions of law and orders. The judge can then

select the version, altered or unaltered, which he prefers. However, counsel for Harvester and others were never told how you would rule with respect to Wisconsin Steel's motion to dismiss Harvester's counterclaim, Wisconsin Steel's motion for discovery of documents in Harvester's possession that were allegedly protected by the attorney-client privilege, Wisconsin Steel's motion to compel parties other than Harvester to produce documents, and Chicago, West Pullman & Southern Railroad Co.'s application for Wisconsin Steel's payment of demurrage charges. The misconduct lay in your *ex parte* having your law clerk request counsel for Wisconsin Steel to prepare those four orders and then releasing them as your own. All four orders were in Wisconsin Steel's favor and counsel for Harvester never had a chance to object to them in advance. In fact, there could have been no plausible ethical objection to the procedure used as to the four orders except for the foregoing mailing incident revealing dramatically the covert unethical practices employed. It is no defense that you retained one of the draft orders four to six months before entering it on January 7, 1985, without change.

The knowledge that a judge will rule in a particular way is invaluable information to the lawyer and the client, particularly when the other lawyers and their clients do not share in that information.

In the course of the January 22 transcript, when this practice surfaced, you defended your action by stating that you frequently ask lawyers to submit proposed orders. On the other hand, your letter of April 11 reveals only four such *ex parte* instances. That feature is of course the vice involved. While you stated in the same transcript that you do not have time to sit down and draft orders and therefore you have lawyers submit proposed

orders, your April 11 letter does not admit to any other instances where this was done *ex parte*. You also stated in the January 22 transcript that you do not regard as improper the procedure you employed, adding that you "think it's a procedure that's followed from time to time not only in this court but probably in most every other court." Your April 11 letter to me does not reveal any other instances except these four, and you add therein that you have "no knowledge of whether any of my fellow judges engage in that practice." I do not agree with you that your secret procedure in these four instances has been followed by other members of your court or by other judges. No such instance has ever been brought to our attention, and all of us were shocked when we learned of your practice in at least these four instances.

The misconduct here is especially disquieting since counsel for Wisconsin Steel was successful in all four uncovered instances. It is understood that the Executive Committee of the United States District Court for the Northern District of Illinois is looking into that firm's unfortunate behavior in these four instances.

As you know, there has been considerable publicity about your conduct in this bankruptcy proceeding, thus persuading the Judicial Council of this Circuit that a written public censure is essential in addition to the oral reprimand that I have meted out this day. These sanctions are warranted under 28 U.S.C. § 372(c)(6).

As you admitted in your April 11 letter to me, you now realize that your conduct in this case has "given rise to the appearance of unprofessional conduct." In the future, in accordance with the Canons of Judicial Ethics, you must of course eschew any incidents which

would ever again give rise to the "appearance of impropriety."

Very truly yours,

/s/ Walter J. Cummings
Walter J. Cummings,
Chief Judge of the
Seventh Circuit

APPENDIX H

Constitutional Provision Involved

U.S. CONST. amend V:

GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statutes Involved

28 U.S.C. §455:

Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a rea-

sonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

28 U.S.C. §1927:

Counsel's liability for excessive costs

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

No. 87-1299

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

COLONY SQUARE COMPANY,
a Georgia Limited Partnership,
Petitioner,

v.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

In this long (twelve years), litigious (original and appellate proceedings before nine different state and federal courts) and acrimonious (multiple disqualification motions by petitioner) bankruptcy case, petitioner seeks a remand for *de novo* proceedings before a different bankruptcy judge due to the manner in which three orders of the court were prepared. These orders were prepared by counsel for respondent, at the request of the bankruptcy court, after the court decided to rule in respondent's favor. Although petitioner's counsel were not expressly notified that these three orders were prepared in this fashion, they knew that other orders in the case had been prepared in the same manner and that the bankruptcy judge had previously used this procedure with petitioner's counsel in another case. The principal orders subject to collateral challenge by petitioner here have each been affirmed by the district court and/or the court of appeals, with knowledge of petitioner's claim that they were prepared improperly.

The question presented is:

Whether, in light of the circumstances of this case and the detailed factual findings of the district court, all of which are fully supported by substantial evidence in the record, the court of appeals erred in affirming the decision of the district court which declined to vacate three orders of the bankruptcy court and to disqualify the bankruptcy judge and respondent's counsel.

PARTIES TO THE PROCEEDING

The parties to the proceedings below were the petitioner, Colony Square Company, a Georgia Limited Partnership, and the respondent, The Prudential Insurance Company of America.*

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* Pursuant to Rule 28.1 of this Court, a listing of the subsidiaries and affiliates of The Prudential Insurance Company of America is provided in the Appendix hereto.

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BRIEF IN OPPOSITION

The Prudential Insurance Company of America ("Prudential") files this Brief in Opposition to the Petition for a Writ of Certiorari filed by Petitioner, Colony Square Company ("Colony").

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 819 F.2d 272 and is reproduced in Appendix A to the Petition (App. A-A1-11).[1]

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[1] In this brief, the Appendix to the Petition is referred to as "App.", the Petition as "Pet.," the Record on appeal as "R," and exhibits introduced by petitioner and respondent below as "CS" and "PR", respectively.

The opinion of the United States District Court for the Northern District of Georgia is reported at 60 Bankr. 1003 (1986) and is reproduced in Appendix B to the Petition (App. B-A12-58).

COUNTERSTATEMENT OF THE CASE

The underlying dispute between the parties concerns Colony's failure to honor the obligations it voluntarily assumed as part of the confirmed plan of arrangement entered in bankruptcy proceedings Colony initiated in 1975 under Chapter XII of the (subsequently repealed) Bankruptcy Act of 1898. In 1982, when Prudential sought to enforce its rights under that plan, Colony embarked on a series of procedural maneuvers and collateral litigation in nine different federal and state courts, including repeated attempts to disqualify the judge presiding in the bankruptcy court after he made several rulings in Prudential's favor.

The issue before the lower courts was whether this protracted case should be remanded for additional proceedings before a different judge because three orders of the bankruptcy court were prepared by counsel for Prudential at the request of the bankruptcy court, apparently without petitioner's advance knowledge. Based on the extensive evidentiary record developed during proceedings before the district court, both the district court and the court of appeals found that the relief requested was not required in light of the specific facts and circumstances of this case.[2] In the case of each order, the bankruptcy judge held hearings and received extensive briefs from the parties and had already reached a definite decision (App. A-A8-9, A11; App. B-A18-19,

[2] These facts and circumstances are set forth at length in the detailed opinion of the district court and summarized in the opinion of the court of appeals. The petition largely disregards these factual findings, substituting petitioner's version of events in their place. As a result, the counterstatement is somewhat more detailed than would otherwise be required.

A23, A24, A45) before requesting that the order be prepared. In each instance, the judge provided specific instructions as to the contents of the order. (App. A-A9, A11; App. B-A18-19, A23, A24, A45.) Each of the principal orders has been independently reviewed and affirmed by the district court and, in the case of the main order at issue, by the court of appeals. (App. A-A10; App. B-A17, A23, A24, A46.)

A. Colony's Original Bankruptcy Petition and Its Failure to Meet Its Obligations Under the Agreed Plan of Arrangement

In October 1975, Colony filed its voluntary Chapter XII bankruptcy petition and, in March 1977, an agreed plan of arrangement was confirmed in that case by order of the federal bankruptcy court in Atlanta. Under the plan, Colony retained title to the Colony Square Complex but Prudential leased and managed it. Because the plan remained to be carried out, no final decree was issued, and the bankruptcy court retained exclusive jurisdiction over the plan, the property and the parties. (App. B-A15.)

For over four years, Colony met its financial obligations under the plan. In October, 1981, however, Colony failed to make its required payment; it also failed either to discharge its debt to Prudential or to bring the debt current as required by the plan. As a result, on January 8, 1982, Prudential notified Colony that it was exercising its option under the agreed upon plan to purchase the property in exchange for cancellation of Colony's debt. January 29, 1982 was set as the date for the tender of the requisite documents. (App. B-A15.)

B. Colony's Unsuccessful Efforts to Avoid Its Obligations Under the Plan

1. *Colony's Second Bankruptcy Case*

One day before the tender was to take place, Colony filed a voluntary Chapter 11 case in the federal bank-

ruptcy court in Pittsburgh. Relying on the automatic stay provision of the new Bankruptcy Code, Colony contended that the filing of its new bankruptcy case superseded its obligations in the pending proceedings before the Atlanta bankruptcy court. The federal district court in Pittsburgh rejected this argument and, in November, 1983, transferred Colony's second bankruptcy case to the Atlanta district court which, in turn, referred it to the Atlanta bankruptcy court.[3] (App. B-A15-16.)

2. *Prudential's Motion to Compel Compliance With the Plan*

On February 9, 1984, Prudential filed a motion with the Atlanta bankruptcy court to compel Colony's compliance with the plan and to transfer title to Prudential, as expressly provided by the plan. In response, Colony filed a "counterclaim" asserting that Prudential had mismanaged the property, barring Prudential's remedies under the plan.[4] After briefing and argument at a series of hearings, the Atlanta bankruptcy court held on May 14, 1984 that, under the express terms of the plan, Colony's "counterclaim" did not bar Prudential's right to take title to the property. The court then severed the mismanagement claim for separate trial. This order, which is not challenged here, was appealed and affirmed by both the district court and the Court of Appeals. *In re Colony Square Company*, 779 F.2d 653 (1986),

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[3] Because Colony's second case involved the same property that was subject to the pending proceeding, the Atlanta bankruptcy court dismissed the second case for lack of subject matter jurisdiction on March 26, 1984. (App. B-A16.) This order, which is not challenged here, was appealed and affirmed by the district court and the Court of Appeals. *In re Colony Square Company*, 788 F.2d 739 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 95 (1986). (App. B-A16.)

[4] Until Prudential notified Colony that it would exercise its option to take title to the property, Colony never once complained of mismanagement by Prudential, although it had a right to do so under the plan.

cert. denied, 107 S. Ct. 95 (1986). The court also scheduled a final hearing on Prudential's motion to compel compliance. (App. B-A16-17.)

3. *Colony's Third Bankruptcy Case*

In the meantime, shortly after the dismissal of Colony's second bankruptcy case, unsecured creditors affiliated with certain of Colony's limited partners filed an "involuntary" bankruptcy petition against Colony in the Pittsburgh bankruptcy court. Two days before the final hearing on Prudential's motion to compel compliance with the original plan, Colony voluntarily converted the newly filed "involuntary" bankruptcy case to a Chapter 11 case under the Bankruptcy Code. (App. B-A16.)

4. *The Title Order*

The last of many hearings on Prudential's motion to enforce compliance with the plan took place on Friday, June 22, 1984. Prior to the hearing, both parties filed extensive briefs. (App. B-A18.) The hearing itself lasted two and one-half hours. (App. A-A2.) As the district court found, the bankruptcy judge participated actively and displayed full awareness of the issues. (App. B-A49; PR-130.) Colony had every opportunity to present its reasons why title should not be transferred. Colony's sole defenses were to (i) repeat its previously rejected contention that its mismanagement "counterclaim" prevented the transfer of title to Prudential, and (ii) contend that Colony's recently converted third bankruptcy case stayed all further proceedings before the Atlanta bankruptcy court. (App. B-A16-17; PR-130.) Relying on its prior decisions to dismiss Colony's second bankruptcy case and to sever the mismanagement claim, the court rejected these arguments from the bench, whereupon Colony moved to recuse the court for bias. (App. B-A17, n.2.) Colony also threatened to bring an immediate contempt action in Pittsburgh, if Prudential proceeded with the hearing. (PR-130 at 4.)

After the June 22, 1984 hearing, the Atlanta bankruptcy judge called Prudential's counsel at his office and informed counsel that he had decided to rule in Prudential's favor. In light of the imminent "sunset" of bankruptcy courts, *see Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982), *judgment stayed*, 459 U.S. 813 (1982), the judge asked counsel for Prudential to prepare an order granting Prudential's motion, specifying the points to be included. (App. B-A18-19, A47; R3-(57-59); PR-190.) A draft order was prepared and delivered to the judge's chambers later that day.[5] (App. B-A19.) The bankruptcy court reviewed the draft order prepared by counsel and, after making several typographical corrections, entered the order on June 25, 1984.[6] (App. B-A20; R4-249, 255; PR-134.) Counsel for Colony was not expressly notified that the bankruptcy court had requested Prudential's counsel to

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[5] At that time, counsel for Prudential requested a hearing (set for the following Monday) to consider a motion to enjoin Colony from further collateral attacks on the jurisdiction of the bankruptcy court, including the threatened contempt proceedings in the Pittsburgh bankruptcy court. (App. B-A19.) These are the "other" *ex parte* contacts referred to in the petition. (Pet. 2 n.2.)

[6] The same day, the Pittsburgh bankruptcy court considered Colony's motion to enjoin Prudential from taking any action against the Colony Square property. (App. B-A20.) Petitioner relies on the fact that during the course of that hearing, but before the Atlanta bankruptcy judge had signed the title order, counsel for Prudential stated that "we don't know how [the Atlanta bankruptcy court] is going to rule." (Pet. at 5.) The district court found that this statement was misleading. (App. B-A54.) However, contrary to petitioner's contention that this statement was material to the proceeding (Pet. at 5, n.18), the district court found that Colony had not shown that it was harmed as a result. (App. B-A48, A54.) Two days after the hearing, the Pittsburgh bankruptcy judge denied Colony's motion for a temporary restraining order out of a sense of comity for the Atlanta bankruptcy court. (App. B-A21, A48.) Previously, the federal district court in Pittsburgh had held that Colony's "second" bankruptcy petition did not divest the Atlanta bankruptcy court of jurisdiction over the property. (App. B-21.)

prepare the order transferring title. (App. B-A18, A20.) However, contrary to petitioner's contention that the bankruptcy court was engaged in a collusive, unethical attempt to cover up the manner in which the order was prepared, *see* Pet. at (i), 3, 5, 7, 18, the district court found that there was no intent on the part of the bankruptcy court to keep this information from Colony's counsel. (App. B-A57.) Instead, the bankruptcy court assumed "that counsel for the prevailing party will communicate with a Colony Square attorney regarding any draft which was prepared. . . ." (App. B-A57.)

The title order is the centerpiece of petitioner's repeated efforts to disqualify the bankruptcy judge. This order involved only legal issues, not disputed facts. (App. B-A46.) Significantly, the title order has been appealed and affirmed as legally correct by both the district court and the Court of Appeals,[7] *see In re Colony Square Co.*, 779 F.2d 653 (11th Cir.), *cert. denied*, 107 S. Ct. 95 (1986), as was each of the other "two critical orders" of the bankruptcy court which are not subject to collateral attack (App. B-A50, n.4), but which had already effectively disposed of Colony's only two grounds for resisting the relief granted in the title order. *See* p. 4, *supra*.

C. Colony's Motions to Disqualify the Bankruptcy Judge

1. *Colony's First Set of Written Motions*

On August 31, 1984, eight weeks after the title order, Colony filed identical motions before the bankruptcy court and the district court to disqualify the bankruptcy judge

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[7] Colony repeatedly informed the Court of Appeals of its claim that the title order should be vacated due to the manner of its preparation: it sought a stay of the appeal (App. B-A17), it raised the issue during oral argument on the merits, and it filed the briefs and transcripts of the disqualification hearings before the district court. Colony also notified this Court of its collateral challenge to the title order in seeking a writ of certiorari to review that order. *See* Petition in S. Ct. Dkt. 85-2041, at 9-10 n.5 and Appendix to Petition therein at 120a-163a.

for bias as manifested in his rulings.[8] (App. B-A55.) Colony did not raise the issue of counsel's preparation of orders even though it knew that the bankruptcy court had requested Prudential's counsel to prepare several orders.[9] After receiving briefs, the bankruptcy court held a hearing on Colony's disqualification motion on September 17, 1984. (App. B-A23; PR-147.) As the district court found, the bankruptcy judge "was an active participant in the proceedings and was intimately familiar with the issues." (App. B-A45.) Four weeks later, after reaching his decision to deny the motion, the bankruptcy court telephoned counsel for Prudential, instructing him to prepare an order to that effect and describing the specific points to be addressed. (App. B-A23; R3-(131-136); R4-(207-218); PR-198.) A detailed order was drafted and submitted to the court, which reviewed and then entered the order several days later. (App. B-A23; PR-151.) As in the case of the title order, counsel for Colony was not informed of the manner in which this order was prepared. (App. B-A23.) The district court found, however, that there was no intent by the bankruptcy court to hide this fact from petitioner's counsel.[10] (App. B-A57.) Col-

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[8] At the June 22, 1984 title hearing, counsel for Colony made two oral motions demanding that the bankruptcy judge recuse himself for bias. The bankruptcy judge initially denied these motions from the bench but, on June 25, 1984, withdrew his denial and permitted Colony to file a written motion. (App. B-A17, n.2, A22.)

[9] After the title order was entered, the parties filed a series of motions that were argued on August 27 and 28, 1984. On August 29, the bankruptcy court informed counsel for Prudential that it had ruled in Prudential's favor on three of the motions, requesting that counsel for Prudential prepare appropriate orders. Counsel for Prudential notified opposing counsel of the court's decision later that day. (App. B-A21-22, A25, A55-56; PR-192; R3-(113-115).)

[10] Colony refers to allegedly false statements by counsel for Prudential in connection with the disqualification order as evidence of a collusive cover-up. Petitioner particularly stresses counsel's

ony appealed the denial of its disqualification order to the district court. Having already denied Colony's companion motion to disqualify the bankruptcy judge, the district court affirmed the bankruptcy court's order. (App. B-A23.) Colony did not appeal.

2. *Colony's Second Set of Written Motions*

Colony's original disqualification motions were not finally resolved until March, 1985. Although it knew that counsel for Prudential had prepared several orders of the court, Colony never raised this issue in support of its claims of bias. Nor had it made any effort to investigate whether other orders, including the title order, had been prepared in this fashion, even though counsel for Colony (i) immediately congratulated Prudential's counsel on his "handiwork" in connection with the title order (App. B-A26); (ii) repeatedly described the title order as "so bad it could have been written by [Prudential's counsel]" (App. B-A26, A28-29); (iii) acknowledged that "it was the general impression among our co-counsel [in Atlanta] that most if not all of Judge Robinson's opinions in the Colony Square proceedings were in fact authored by lawyers [for Prudential]" (App. B-A30); and (iv) had themselves been asked by the same bankruptcy judge to prepare orders in another case (App. B-A28).

It was only after reading about the disqualification of a judge in another case and after the district court affirmed the title order and the order severing Colony's mismanagement claims on April 2, 1985, that counsel for Colony actively sought to confirm that other orders of the bankruptcy judge, particularly the title order, had been prepared by counsel for Prudential. (App. B-A40-41.)

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denial, in an affidavit, of improper *ex parte* contacts with the bankruptcy court. (Pet. at 6, 7.) The district court "carefully considered" these statements in detail and concluded, on the basis of all of the record evidence, that, under the circumstances in which they were made, counsel did not intend to mislead either opposing counsel or the court. (App. B-A53-54.)

Finally, on May 20, 1985, counsel for Colony asked counsel for Prudential whether he had prepared the title order. Prudential's counsel responded that he had done so and that, at the request of the bankruptcy court, he had prepared several other orders, which he then identified. (App. B-A41.)

On June 6, 1985, Colony filed motions with the bankruptcy court, the district court and the court of appeals seeking to disqualify both the bankruptcy judge and counsel for Prudential and to vacate the title order and six other orders that had been prepared, at the request of the bankruptcy judge, by counsel for Prudential.[11] The district court directed that extensive discovery take place, including discovery from the bankruptcy judge himself. (App. A-A3-4.) In addition, a four-day evidentiary hearing was held and both sides filed extensive prehearing and post-hearing briefs. (App. B-A13.)

D. The Opinions Below

1. *The Opinion of the District Court*

On May 9, 1986, the district court denied Colony's motion in a 51-page opinion which, as described by the court of appeals, "made detailed findings concerning the facts surrounding the issuing of the bankruptcy judge's orders and their discovery by Colony's lawyers." (App. A-A4.) The district court ruled that Colony had not been

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[11] The motions filed with the bankruptcy court and the court of appeals were withdrawn or dismissed. Although counsel for Colony first averred that they were unaware that any of these orders had been prepared by counsel for Prudential, Colony's counsel had actual knowledge of the preparation of four of these orders. (App. B-A25.) In addition to the title order and the disqualification order, the only order of which Colony's counsel was not aware was an order denying reconsideration of an award of fees in connection with an earlier order awarding discovery sanctions. The circumstances surrounding the preparation of this order—which the petition notes is not "crucial" (Pet. at 3)—are set out in the opinion of the district court. (App. B-A24, A45; R-4 (218-220).)

denied due process, noting that it had been given notice of pending issues and an adequate opportunity to present its arguments prior to the bankruptcy court's decision and, further, that the judge had reached firm decisions prior to his request that counsel for Prudential prepare orders reflecting those decisions (App. B-A45.) The district court also emphasized that each of the principal orders had been independently affirmed on appeal, that it believed the orders were correct as a matter of law when it had originally reviewed them and that, after examining them again, it "continued to hold this belief." (App. B-A46, A49-51.) The district court rejected, as contrary to the evidence, Colony's various contentions (identical to those raised in the petition) that it had, in fact, been prejudiced by the method of preparation of the orders. (App. B-A47-49.) Finally, the district court determined that, in light of the facts of the case, the challenged orders need not be vacated and neither the bankruptcy judge nor Prudential's counsel disqualified. (App. B-A51-57.) Colony appealed.

2. ***The Opinion of the Court of Appeals***

On June 12, 1987, the court of appeals affirmed the decision of the district court, finding that "the record in this case does not warrant overturning the lower court's judgment." (App. A-A2.) The court of appeals "strongly disapprove[d]" the method of preparing the three orders in question, stating that the "bankruptcy judge's actions in preparing these orders have little to commend them." (App. A-A2, A11.) However, "having reviewed the record in this case," the court of appeals concluded that "Colony was not denied due process." (App. A-A8, A11.)

In reaching this conclusion, it stressed that the bankruptcy judge "was found to have already reached a firm decision before asking [counsel for Prudential] to draft the proposed orders." (App. A-A8, A11.) There was substantial evidence in the record to support this finding of fact and "no evidence to indicate that this finding was clearly erroneous." (App. A-A8 n.16.) The court of

appeals also noted that the bankruptcy court's "decisions followed a number of hearings on those issues where the judge played an active and ongoing role." (App. A-A9.) "Rather than being swayed by the proposed orders, the bankruptcy court directed that draft orders be prepared which reached a particular result and discussed specific points." (App. A-A9.) On the basis of this evidence, the court of appeals concluded that the bankruptcy judge "did not abdicate his adjudicative role." (App. A-A9.)

The court of appeals also stressed that Colony "had ample opportunity to present its arguments" and that the challenged orders "were reviewed and affirmed by the district court." (App. A-A10, A11.) In addition, the title order—which is the focus of Colony's attack here—was independently reviewed and affirmed by the court of appeals "as correct as a matter of law." (App. A-A10.) As a result, Colony was not denied a meaningful opportunity to be heard.

Finally, the court of appeals did not believe that the bankruptcy court was obligated to recuse itself *sua sponte* pursuant to 28 U.S.C. § 455(a). The court of appeals rejected this contention, as had the district court, noting that § 455(a) had not been applied to the type of circumstances presented in this case. (App. A-A8 n.14; App. B-A56-57.)

Colony sought rehearing *en banc* on essentially the same grounds contained in its petition here. Rehearing was denied on November 6, 1987, with no judge on the full court requesting a vote on rehearing *en banc*. (App. D-A61-62.)

REASONS FOR DENYING CERTIORARI

The petition should be denied because the decision of the court of appeals below is correct, does not conflict with the holdings of this court or any other court of appeals, and does not present an important question for resolution by this Court.

I. THE PETITION DOES NOT PRESENT ANY ISSUE OF GENERAL PUBLIC IMPORTANCE

A. The Decision Below Is Limited to the Procedural And Factual Circumstances of This Case

The decision of the court of appeals involves the application of accepted legal principles to the unique procedural facts and circumstances of the case. *See* Parts IC and II, *infra*. In concluding that the manner in which three orders had been prepared did not require that they be vacated or the bankruptcy judge disqualified, the court of appeals based its decision on its review of the extensive factual record in the case. (App. A-A2, A8, A11.) In particular, the court stressed the fact that: (i) the bankruptcy court had reached a firm decision before asking counsel to prepare draft orders (App. A-A8); (ii) the bankruptcy court had reviewed the extensive briefs of the parties on the issues involved and had actively participated in lengthy hearings, demonstrating that he had not abdicated his judicial role (App. A-A9); (iii) the principal orders in question had been independently reviewed and affirmed on appeal as a matter of law (App. A-A10); and (iv) petitioner failed to demonstrate any prejudice as a result of the manner of preparation of the orders (App. A-A11).

The specific factual circumstances of this case were central to the court of appeals' decision.[12] They are highly unusual and unlikely to recur, as the district court recognized when it referred to the "extraordinary circumstances presented by this litigation". (App. B-A52.)

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[12] Each of these factual findings was made on the basis of the district court's careful and detailed examination of the extensive evidence in the record. While petitioner disputes or ignores many of them, each was affirmed by the court of appeals. Because the Court does not sit "to review evidence and discuss specific facts," *United States v. Johnston*, 268 U.S. 220, 227 (1925); *Texas v. Mead*, 465 U.S. 1041 (1984), review of those factual determinations is unwarranted.

Accordingly, the decision below does not present issues of general public importance beyond the interests of the parties below. It is therefore not appropriate for this Court's certiorari review. *See, e.g., Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923); *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955).

B. The Decision Below Does Not Condone, Much Less Encourage, Judicial Misconduct

Reduced to its essence, petitioner's principal argument for review is that the decision of the court of appeals condones and thereby encourages judicial misconduct,[13] threatening the integrity of the judicial system. (Pet. at 2, 9, 28.) Any fair reading of the decision below belies this contention. While the court of appeals determined that the challenged orders need not be vacated nor the bankruptcy judge disqualified, it did not reach this conclusion because it approved of the method in which the orders were prepared. To the contrary, the court of appeals "strongly disapprove[d] of the bankruptcy judge's methods" in having counsel prepare orders without taking steps to assure notice to the other side. (App. A-A2, A11.) So did the district court. (App. B-A57.) Both courts recognized the possible problems associated with this practice and unequivocally endorsed decisions of this

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[13] The petition also seeks review of the decision below for failing to disqualify counsel (but not the bankruptcy judge) on grounds that the court of appeals so far departed from accepted judicial practice as to call for supervisory action by the Court. (Pet. at 26-27.) While the district court found that counsel had acted improperly (App. A-A52), it also concluded that, in view of "the extraordinary circumstances presented by this litigation," petitioner did not satisfy the two-part test for disqualification set forth in *Kleiner v. First National Bank of Atlanta*, 751 F.2d 1193, 1210 (11th Cir. 1985). (App. A-A52-55.) The petition does not even refer to this test, much less suggest that it is improper, or that it was misapplied. There was no departure from accepted judicial practice with regard to disqualification of counsel.

Court and other courts of appeals which criticize it. (App. A-A4-7; App. B-A41-43.) Under the circumstances, it can hardly be said that the decision below condones, much less encourages, the practice which it so harshly criticizes. Significantly, petitioner cites no instance in which another court has interpreted either of the decisions below as endorsing the preparation of orders by counsel.[14]

C. This Case Presents No Genuine Issue With Regard to the Judicial Disqualification Statute and Adds Nothing to The Liljeberg Case

Petitioner implicitly recognizes that the narrow, fact-bound holding of the court below does not justify independent review by this Court when it suggests, as its first reason for granting certiorari, that this case, together with *Liljeberg v. Health Services Acquisition Corp.*, S. Ct. Dkt. No. 86-957 (argued December 9, 1987) "provides an ideal opportunity for the Court to set out clear guidelines for the federal courts to follow in applying 28 U.S.C. § 455" to instances of alleged judicial misconduct. (Pet. at 9, 28.) Even if the Court might one day be inclined to accept an invitation to legislate a comprehensive set of "guidelines" for the federal courts to follow in applying 28 U.S.C. § 455(a), it is difficult to see how this case, either alone or together with *Liljeberg*, provides an appropriate opportunity to do so.[15]

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[14] Petitioner cites one editorial which criticizes the decision below (as well as the decision in another case). (Pet. at 15, n.45.) The same editorial acknowledges the possibility that "reasonable minds could differ in the propriety of ghostwriting. . . ." *See* Nat'l L.J. Aug. 17, 1987. Evidently, neither the United States of America, which appeared as *amicus* before the district court, nor the judges of the full court of appeals, which denied rehearing *en banc*, feel that the decision below has the dire consequences predicted by petitioner.

[15] The decision below does not contain an extended analysis of § 455(a). Reflecting the fact that the issues petitioner presented to the courts below were couched principally in terms of an alleged violation of petitioner's due process rights, the court of appeals'

In their posture before the Court, the two cases are entirely dissimilar. *Liljeberg* involves an express conflict in the courts of appeal on the pivotal question of whether disqualification under § 455(a) was retroactive or prospective. *Compare United States v. Murphy*, 768 F.2d 1518, 1539 (7th Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986) with *Health Services Acquisition Corp. v. Liljeberg*, 796 F.2d (5th Cir. 1986), *cert. granted* 107 S. Ct. 1368 (1987). That issue is not even mentioned in the decision below. Accordingly, this case can add nothing to the Court's consideration of the issues raised in *Liljeberg*. Not surprisingly, neither the parties nor the *amici* in *Liljeberg* cite either of the decisions below in any of their briefs before this Court.

The courts below did not address the retroactivity of disqualification under § 455(a) because they concluded that § 455(a) did not apply to the conduct at issue in this case.[16] In *Liljeberg*, by contrast, the lower court found—and the petitioner in that case conceded before

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discussion of § 455(a) is contained in one footnote. Evidently recognizing that this is not the detailed treatment of issues the Court might expect before developing "guidelines" of the sort suggested in the petition, petitioner tries to piggy-back review of this case on *Liljeberg*.

[16] The courts below stressed that the alleged appearance of impropriety or partiality in this case stemmed from the manner in which court orders were prepared, not from some "extra-judicial" source (App. B-A56-57) such as "financial or personal conflicts of interests" (App. A-A8) of the sort generally thought to be covered by the statute. *See, e.g., Hamm v. Members of Board of Regents of State of Florida*, 708 F.2d 647, 651 (11th Cir. 1983). Although petitioner contends that the court below clearly erred in this regard (Pet. at 12-17), it cites only one district court decision for the proposition that "ghostwritten" opinions require disqualification of the judge under § 455(a) in every case. *In re Wisconsin Steel Corp.*, 48 B.R. 753 (N.D. Ill. 1985). However, the same district court has not construed § 455(a) so broadly in a subsequent case. *See, e.g., In Re Cenco, Inc., Securities Litigation*, 642 F. Supp. 539, 542-43 (N.D. Ill. 1986).

this Court (*see* Petition in S. Ct. Dkt. 86-957 at n.6)—that there was an appearance of partiality of the sort covered in § 455(a). It is therefore not the case, as petitioner contends (Pet. at 11), that the Court's disposition of *Liljeberg* controls, or even affects, the result in this case. In this regard, it should also be noted that the district court below denied petitioner's motion to disqualify pursuant to § 455(a) on the alternate ground that the motion was not timely. (App. B-A55.)

Petitioner also contends that the court below committed "a crucial error" when it failed to quote the text of § 455(a) and then characterized petitioner's claim as one of the "appearance of impropriety" rather than that the court's "impartiality might be reasonably questioned." (Pet. at 13, n.4) This is nothing but a quibble: the court of appeals twice cites the pertinent statutory provision and petitioner itself argued to the court below that "the goal of the judicial disqualification statute is to foster the *appearance* of impartiality." (Brief of Appellant at 28, emphasis in original.) Significantly, petitioner does not seriously suggest that this alleged "error" affected the decision below.

II. THE DECISION BELOW WAS CORRECT AND DOES NOT CONFLICT WITH THE DUE PROCESS DECISIONS OF THIS COURT OR ANY OTHER COURT OF APPEALS

The court of appeals carefully considered and rejected the due process arguments raised here by petitioner. The decision below was correct and fully in accordance with applicable Supreme Court and other precedent, which establishes that orders or other judicial acts are not *per se* invalid or a violation of due process simply because they are prepared by one side or involved *ex parte* contacts. *See, e.g., Anderson v. City of Bessemer*, 470 U.S. 564, 572 (1985) (findings adopted verbatim from litigants given deference when "court itself pro-

vided framework for the proposed order"); *United States v. Adams*, 785 F.2d 917, 920-21 (11th Cir.), *cert. denied*, 107 S. Ct. 650 (1986) (*ex parte* conference between judge and government party not unconstitutional); *Odeco, Inc. v. Avondale Shipyards, Inc.*, 663 F.2d 650, 652-53 (5th Cir. 1981) (finding adopted verbatim given deference where record shows that judge fully comprehended issues and adequately performed "decision making process"); *Keystone Plastics, Inc. v. C & P Plastics, Inc.*, 506 F.2d 960 (5th Cir. 1975) (different standard of review not mandated by court's adoption of findings and conclusions without notice to opposing party). Instead, orders will be vacated on due process grounds only if they were reached by a process that is fundamentally unfair. *Margoles v. Johns*, 660 F.2d 291, 296 (7th Cir. 1981), *cert. denied*, 455 U.S. 909 (1982). *See generally*, *Aetna Life Insurance Co. v. LaVoie*, 475 U.S. 813 (1986).

Applying these accepted standards to the facts in this case, the court below correctly concluded that, in light of all the circumstances, the process by which the three orders were prepared was not fundamentally unfair. In reaching this conclusion, the court of appeals stressed that petitioner had an extensive opportunity to brief and argue the issues, the bankruptcy judge had made a firm decision prior to requesting the preparation of a draft order, and the orders were independently reviewed and affirmed on appeal. *See* pp. 11-12 *supra*.

Petitioner contends that the decision below conflicts with the decisions of this Court and other courts of appeal insofar as it held that petitioner's due process rights were not violated. (Pet. at 17-26.) With one possible exception (*see* p. 19, *infra*), however, petitioner fails to identify any specific decision of this Court or any other court of appeals that it contends is in direct conflict with the decision below. This is not surprising since, as the Court has noted, "[m]ost matters relating

to judicial disqualification [do] not rise to a constitutional level." *FTC v. Cement Institute*, 333 U.S. 683, 702 (1948).

Instead, petitioner struggles to create "conflicts" by citing general language from a wide variety of decisions and ignoring the factual and procedural differences between the present case and the cases it cites (none of which involves mandatory disqualification of judges and vacating orders prepared by counsel at the request of the court under the circumstances present here).[17] *E.g.*, *Aetna Life Insurance Co. v. LaVoie*, 475 U.S. 813 (1986) (due process violated where the court had personal stake in outcome); *In re Murchison*, 349 U.S. 133 (1955) (due process violated where court combined roles of judge and grand jury); *Rapp v. Van Dusen*, 350 F.2d 806 (3d Cir. 1965) (disqualification where court expressly retained counsel for one party to act as court's own counsel in connection with mandamus petition). Indeed, the court of appeals cites with favor many of the decisions on which the petition relies. *See, e.g., Aetna v. Lavoie, supra; Home Box Office, Inc. v. FCC*, 527 F.2d 9 (D.C. Cir. 1977); *Keystone Plastics, Inc. v. C&P Plastics, Inc., supra; In re Wisconsin Steel, supra; Chicopee Manufacturing Corp. v. Kendall Co.*, 288 F.2d 719 (4th Cir.), *cert. denied*, 386 U.S. 825 (1961). These are not the sort of genuine, irreconcilable "conflicts" of law that might support review by this Court. *See, e.g., Layne & Bowler v. Western Well Works, supra.*

In the one possible "conflict" cited by petitioner, *Chicopee Manufacturing Corp. v. Kendall Co.*, 288 F.2d 719, 724-25 (4th Cir.), *cert. denied*, 386 U.S. 825

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[17] The two administrative cases cited in the petition are inapposite. *Camero v. United States*, 375 F.2d 777 (Ct. Cl. 1967), and *Home Box Office, Inc. v. FCC*, 527 F.2d 9 (D.C. Cir. 1977). In both cases, the decision maker had not made its decision prior to the *ex parte* contacts but instead relied on those contacts in order to reach a decision. That is the precise opposite of what occurred in this case.

(1961), the court of appeals appears to have found a due process violation simply because findings of fact and conclusions of law were prepared without notice to the other side. Nevertheless, the court directed that the case be dismissed on remand because the record conclusively showed that the decision below was justified. *Id.* at 725. That is essentially what happened here, as the orders collaterally attacked by petitioner have each been independently reviewed on appeal and upheld as legally correct. Moreover, even if the 27-year-old decision in *Chicopee* accurately reflects the current views of the Court of Appeals for the Fourth Circuit (*but see, Anderson v. City of Bessemer, supra, reversing* 717 F.2d 149 (4th Cir.) which relied on *Chicopee*), it is hardly the sort of live "conflict" which the Court ought to decide. To the contrary, the court of appeals below cited *Chicopee* with approval (App. A-A4), when it unequivocally condemned the practice challenged by petitioner.

CONCLUSION

For all of the foregoing reasons, the petition should be denied.

Respectfully submitted,

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March 4, 1988

APPENDIX

APPENDIX

In accordance with Rule 28.1 of this Court, the Prudential Insurance Company of America states that it has no parent corporation and no subsidiaries or affiliates which have outstanding any equity securities that are publicly traded. Set forth below is a list of corporations in which Prudential has or has the right to acquire more than 10% of a class of equity security that is publicly traded. These investments were acquired in the normal course of Prudential's investment operations and not for the purpose of acquiring control of these corporations.

Air Express International Corp.
BRNF Liquidating Trust
Communications Transmission, Inc.
C.P. National Corporation
Crutcher Resources
DMI Furniture
Foodmaker, Inc.
Global Natural Resources
Grubb & Ellis
Intermet Corporation
Judicate
Manufactured Homes
Maxus Energy
Miller Shoe Industries
Scan Optics
Specialty Equipment Companies, Inc.
Tom Brown
UGI
Vicom
Vista Chemical Co.
Wellman
West Texas Utilities
Prudential Special Equity Fund
United States High Yield Fund

No. 87-1299

In the Supreme Court of the United States

OCTOBER TERM, 1987

COLONY SQUARE COMPANY,
a Georgia Limited Partnership,
Petitioner,

vs.

THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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I.

CONTRARY TO PRUDENTIAL'S REPEATED IMPLICATIONS, THE PARTIES FULLY BRIEFED AND ARGUED BELOW THE ISSUES UNDER § 455(a) THAT ARE CLOSELY RELATED TO, BUT SIGNIFICANTLY DIFFERENT FROM, LILJEBERG V. HEALTH SERVICES ACQUISITION CORP.

The issues in *Liljeberg v. Health Services Acquisition Corp.* (Sup. Ct. Docket No. 86-957) are: (1) whether 28 U.S.C. § 455(a) applies when a judge decides a case after having forgotten the circumstances that would cause his impartiality to be questioned, and (2) whether, when the judge and the prevailing party had been innocent of conscious wrongdoing, the retroactive remedy of vacating the judge's decision is appropriate.

The present case presents the more common situation in which the judge has failed to recuse himself despite having been aware of the facts that required his disqualification. In addition, unlike *Liljeberg,* the prevailing party in this case was an active participant in the misconduct warranting disqualification and, therefore, cannot be said to have "fairly won." *Health Services Acquisition Corp. v. Liljeberg,* 796 F.2d 796, 802 (5th Cir. 1986), *cert. granted,* 107 S.Ct. 1368 (1987). Judge Robinson and Prudential's lawyers colluded together in the clandestine *ex parte* contacts; Prudential's lawyers secretly authored the opinions that Judge Robinson then filed verbatim as his own;[1] Prudential's counsel made false state-

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1. It is highly misleading for Prudential to say that Judge Robinson "specif[ied] the points to be included" in the ghost-written opinions. *See, e.g.,* Brief in Opposition at 6. In fact, the opinions as authored by Prudential went well beyond the few points that Judge Robinson sketchily outlined in his *ex parte* telephone calls. *See,* Petition For Writ at 4-5.

ments, both in open court and in affidavits, denying the *ex parte* contacts; and Judge Robinson endorsed the false affidavits in an opinion denying a motion to recuse himself.[2] Thus, the issue of retroactively vacating the judge's orders is presented in this case in a significantly different context from *Liljeberg*.

In our Petition, we have shown that this case raises important issues for this Court to resolve under 28 U.S.C. § 455(a) as well as under the Due Process Clause. Recognizing the close relationship between this case and *Liljeberg* with regard to § 455, Prudential has implied that Colony Square's present reliance on § 455 is an afterthought, that the statute was not adequately briefed and argued in the courts below, and that this Court therefore should not review the issue. *See, e.g.*, Brief in Opposition, p. 15, n. 15. That is a false implication. In fact, the Argument in Petitioner's Brief in the Eleventh Circuit had only three major parts, and the second of them

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2. *See* Petition For Writ at 2-8. In its Brief in Opposition, Prudential repeatedly suggests that Colony Square was aware of these clandestine activities and failed to complain in timely fashion. The Eleventh Circuit has flatly rejected that contention:

> . . . It was not until months later that Colony's lawyers first learned that Judge Robinson had not drafted these three orders.
>
> On learning that Alston & Bird had drafted these orders, Colony reasserted its motion for disqualification and the other relief sought here.

Pet. App. A3 (Opinion of the Court of Appeals).

Moreover, the fact that Colony Square was told of the preparation of certain "other orders" is beside the point. If the practice had been to notify Colony Square of Prudential's preparation of orders, the departure from this practice, far from arousing Colony Square's suspicion, was designed to deceive Colony Square into thinking that the orders at issue had been prepared by the Court and not Prudential's lawyers.

dealt exclusively with § 455.[3] *Liljeberg* itself was cited five times in Petitioner's Brief and Reply Brief. Prudential's Brief also recognized the importance of § 455, devoting seven pages of argument to it.[4]

It is true that the Eleventh Circuit nevertheless chose to deal with § 455 in a cursory fashion.[5] That, however, does not make the issue any less important. On the contrary, it is essential that § 455 be taken seriously by the courts, as Congress intended and as justice requires.

Further, the Eleventh Circuit's expressed grounds for holding the statute inapplicable are no less wrong for having been stated in a footnote. The Eleventh Circuit held that § 455(a) requires disqualification only in cases in which the judge has "financial or personal conflicts." The effect of that ruling would be virtually to abrogate § 455(a), because subsection (b) of the statute deals explicitly with financial and personal conflicts of interest. By contrast, subsection (a) was "designed as a catch-all provision of broader scope than the combined specific disqualification provisions of subsection (b)."[6] Indeed,

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3. II. JUDGE ROBINSON'S SECRET *EX PARTE* CONTACTS MIGHT REASONABLY CAUSE HIS IMPARTIALITY TO BE QUESTIONED, AND HE THEREFORE WAS OBLIGATED TO RECUSE HIMSELF *SUA SPONTE*. . . .

"Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). . . .

Brief For Appellant, Eleventh Circuit, at 24.

4. Brief of Appellee, Eleventh Circuit, at 34-40.

5. Pet. App. at A8, n. 14.

6. Bloom, *Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges*, 35 Case W. Res. L. Rev. 662, 670-671 (1985); *see also id.* at 675.

the only authority on which the Eleventh Circuit relied, 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3549 (2d ed. 1984), states:

> Because of this general provision of § 455(a), an overly-nice reading is not required of the specific instances of disqualification spelled out in § 455(b). . . . There are many other instances in which the general provision of sec. 455(a) will be applicable in order to preserve the appearance of impartial justice. . . .

Thus, the Eleventh Circuit's destructive interpretation of § 455(a) effectively condones judicial misconduct by denying any meaning to that "catch-all" or "general" provision. Regardless of how cursorily the Eleventh Circuit may have ruled, its holding is contrary to precedent and to the sound administration of justice, and should not be allowed to stand.

II.

THE COURT SHOULD ADDRESS PRUDENTIAL'S CONTENTION THAT A JUDGE'S WILLFUL REFUSAL TO RECUSE HIMSELF WHEN REQUIRED TO DO SO CAN BE TREATED AS HARMLESS ERROR.

Colony Square has shown that Judge Robinson's failure to recuse himself caused prejudice to Colony Square as well as to the administration of justice. *See* Petition For Writ at 20-25. Prudential has not attempted to refute that showing. Rather, it has simply asserted that there was no prejudice and has contended, in effect, that Judge Robinson's willful failure to recuse himself

when required to do so is harmless error because he reached a firm decision before having his opinions ghost-written, and because his orders were affirmed on appeal.[7]

The conclusion that Judge Robinson had reached a firm decision before initiating *ex parte* calls to Prudential is based principally upon his own unchallenged self-serving answers to interrogatories.[8] More important, his highly improper conduct casts doubt upon the impartiality of his orders regardless of when he claims to have made up his mind. Consider an analogy. A man gets a full series of blood tests at a laboratory. The report comes back that all of his readings are normal and, in addition, that he is pregnant. If the man is reasonably prudent, he will not only disregard the pregnancy diagnosis, he will also have the entire blood test redone at a different laboratory. Similarly here. Since Judge Robinson has proved himself to have been seriously injudicious and lacking in impartiality, his rulings in the case are suspect regardless of whether a particular decision was made before or after an improper telephone call took place.[9]

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7. *Compare* this Court's recent unanimous decision (Justice Kennedy not participating) in *Peralta v. Heights Medical Center, Inc.*, 56 U.S.L.W. 4189, 4191 (U.S. Feb. 23, 1988):

> Where a person has been deprived of property in a manner contrary to the most basic tenets of due process, 'it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits.' . . . [O]nly 'wiping the slate clean . . . would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place.'

8. Colony Square was not permitted to depose Judge Robinson. *See* Petitioner's Brief, p. 23, fn. 61.

9. For the same reason, contrary to Prudential's assertion, Colony Square does not limit its challenge to the three ghost-

(Continued on following page)

Further, adoption of a rule that appellate review is sufficient to cure a judge's failure to recuse himself would vitiate the recusal statute. If, on appeal, the judge were reversed on the merits, the litigant who lost below because of the judge's bias would have no occasion to complain. If, on the other hand, the judge's opinion were affirmed on appeal, the unfairness (according to Prudential) should be deemed to have been harmless. Thus, the statute would be rendered irrelevant in every case, including, as here, the case in which the judge willfully fails to recuse himself despite the clear command of 28 U.S.C. § 455(a).

Footnote continued—

written orders. Because Judge Robinson's lack of impartiality is manifest in his extremely injudicious conduct on several occasions, other orders in the case have also been tainted. That includes the May 14, 1984, order (in the month before the first *ex parte* telephone call) that severed Colony Square's claim that Prudential had intentionally mismanaged the Colony Square complex in order to obtain title to it.

CONCLUSION

This case complements *Liljeberg v. Health Services Acquisition Corp.* in providing the Court with the opportunity to address issues of major importance regarding 28 U.S.C. § 455(a) and the administration of justice. Among those issues is one raised by Prudential's Brief in Opposition—that a judge's willful failure to recuse himself when required to do so can be treated as harmless error and his tainted orders allowed to stand. Also, contrary to implications by Prudential, § 455 was fully briefed and argued before the Eleventh Circuit. That court's failure to resolve the issue properly, therefore, is a serious matter that should be addressed by this Court. Finally, this Court should exercise its supervisory power to make it clear that unethical conduct of the judiciary and bar of the Federal Courts will not be tolerated.

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